

**A CRITICAL ANALYSIS OF THE SOUTH  
AFRICAN LAW COMMISSION'S *REPORT ON*  
*SURROGATE MOTHERHOOD***

**(PROJECT 65: 1993)**

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## CHAPTER ONE

### INTRODUCTION

Surrogacy agreements make nonsense of traditional notions of the family, and for the most part existing legal and social norms struggle to provide solutions to the problems posed by these agreements. Our legal system recognises the nuclear family unit, which comprises a man, a woman and their offspring, as the 'building block' on which familial relationships are based, and entrenches this family unit by way of laws relating to 'marriage, divorce, adoption, and child care'.<sup>1</sup>

The advent of assisted reproductive technologies has meant that it is now possible to separate the biological, genetic and social aspects of parenting. In the past, the mother of a child has always been presumed to be the woman who gave birth, and this presumption has been regarded as so self evident that, until recently, there was little need to examine how to identify the mother of a child. However, the '[n]ew reproductive technologies, such as artificial fertilisation, in vitro fertilisation, embryo transfers and surrogate motherhood have shaken the unshakeable'.<sup>2</sup> Thus, it is possible for a child born of a surrogacy arrangement to have a different genetic, biological and social mother. It is also possible that the same child could have a different genetic and social father. In addition, the presumption of legitimacy assigns paternity to the

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<sup>1</sup> Ruth Deech 'Families and Fertility'. Unpublished Paper delivered at the Ninth World Conference of the International Society of Family Law, Durban, South African 28-31 July 1997 at 2

<sup>2</sup> Andrea E Stumpf 'Redefining Mother: A legal Matrix For New reproductive Technologies' (1986) 96 *Yale Law Journal* 187 at 187

husband of the biological mother. Where this happens, it is necessary to decide which of these people are recognised as the child's legal parents.

The law has been slow to recognise the existence of those families that do not fit the traditional mould. Dolgin describes the ideology of family as 'a special, almost sacred, arena of social life grounded in inexorable natural relationships'.<sup>3</sup> Surrogacy arrangements challenge the perception that a parent-child relationship is the inevitable result of a biological relationship. 'Ideologically, the transformation has involved acknowledgement that families and familial relationships are not natural or inevitable but constructed and contingent'.<sup>4</sup> Consequently, legal systems tend to struggle when confronted by surrogacy agreements, as they allow people to construct families. Where surrogacy is permitted, there is often resistance to granting access to persons whose family patterns do not conform to those of the nuclear family. This is demonstrated by the comments of Committee of Inquiry into Human Fertilisation and Embryology (Warnock Committee), which are as follows: 'To judge from the evidence many believe that the interests of the child dictate that it should be born into a home where there is a loving, stable, heterosexual relationship and that, therefore, the deliberate creation of a child for a woman who is not a partner in such a relationship is morally wrong .... We believe that as a general rule it is better for children to be born into a two parent family,

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<sup>3</sup> Janet L Dolgin 'The Law Debates the Family: Reproductive Transformations' (1995) 7 *Yale Journal of Law and Feminism* 37 at 40

<sup>4</sup> Janet L Dolgin 'The Law Debates the Family: Reproductive Transformations' (1995) 7 *Yale Journal of Law and Feminism* 37 at 41

with both father and mother, although we recognise that it is impossible with any certainty to predict how lasting such a relationship will be'.<sup>5</sup>

Furthermore, not only do surrogacy arrangements challenge traditional notions of what comprises a family, they also pose a threat to traditional perceptions of women as mothers. So-called 'good mothers' are supposed to act selflessly in protecting the interests of their offspring. Ikemoto comments that if there were to be a code for perfect pregnancy, it would include the following commands: 'Thou shalt obey doctor's orders ... Thou shalt not partake of alcohol or drugs potentially harmful to the f[et]us ... Thou shalt do whatever the state deems necessary during pregnancy to produce a healthy baby ... Thou shalt be a Good Mother'.<sup>6</sup> Where surrogate mothers act for reasons of altruism, it remains possible to reconcile the surrogate mother's conduct with that of the 'good mother'. However, surrogate mothers are often motivated by financial reasons. There is great resistance to a surrogate mother being permitted to charge for her services, as the commercialisation of reproductive labour is regarded by some as repugnant,<sup>7</sup> and, accordingly, the sale of reproductive services in the context of surrogacy is likened by some to prostitution.

Until recently women have been confined to the domestic sphere, where their primary function is to reproduce, motherhood being 'the natural, desired and ultimate goal of all

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<sup>5</sup> Report of the Committee of Inquiry into Human Fertilisation and Embryology, Cmnd. 9314 (1984) at para 2.5.

<sup>6</sup> Lisa C Ikemoto 'The Code of Perfect Pregnancy: At the Intersection of the Ideology of Motherhood, the Practice of Defaulting to Science, and the Interventionist Mindset of Law' (1992) 53(5) *Ohio State Law Journal* 1205 at 1206

<sup>7</sup> Jo Bridgeman and Susan Millns *Feminist Perspectives on Law. Law's Engagement with the Female Body* (1998) at 174-179

normal women, and women who deny their "maternal instincts" are selfish, peculiar or disturbed'.<sup>8</sup> Traditionally, reproductive or gestational labour is unpaid, and consequently largely undervalued by society.<sup>9</sup> However, surrogacy presents the potential surrogate mother with an opportunity to benefit financially from her reproductive labour. Trebilcock comments that 'surrogacy has the potential to transform the confining stereotype of "womanhood as motherhood" by removing the activity of reproductive labour from the private sphere, where it is largely an uncompensated and assumed duty borne by women, thereby allowing women the benefits of economic recognition of their labour'.<sup>10</sup>

It may be helpful at this stage to examine what is meant by the term 'surrogacy'. There are many definitions,<sup>11 12</sup> but, in short, surrogacy is characterised by an agreement whereby a woman undertakes to bear a child for another person or persons. The surrogate mother carries the child to term, but has no intention to rear the child as her own, and when the child is born will hand the child to the commissioning parent or parents.

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<sup>8</sup> Jo Bridgeman and Susan Millns *Feminist Perspectives on Law. Law's Engagement with the Female Body* (1998) at 110

<sup>9</sup> M J Trebilcock *The Limits of Freedom of Contract* (1993) 51

<sup>10</sup> M J Trebilcock *The Limits of Freedom of Contract* (1993) 50-51

<sup>11</sup> A surrogate motherhood arrangement is defined as 'an agreement between a surrogate mother and the commissioning parents in which the surrogate mother undertakes to hand over the child to the commissioning parents upon its birth or within a reasonable time thereafter'. Clause 1, Schedule A to the South African Law Commission *Report on Surrogate Motherhood* (Project 65: 1993)

<sup>12</sup> Pretorius describes that 'in an ordinary surrogate motherhood contract, an agreement is reached between a couple who are not capable of producing their own children in the normal way, and the surrogate mother who undertakes to bear a child from them and to hand it over to the commissioning couple after birth, terminating any parental power she may have over the child'. Diederika Pretorius *Surrogate Motherhood: A Worldwide View of the Issues* (1994) 15

In practice, surrogacy arrangements may take various forms, the most common of which is partial and full surrogacy.<sup>13</sup> In the case of partial surrogacy,<sup>14</sup> the surrogate mother provides the ovum, whilst the commissioning father (or a donor) provides the sperm. There is no need for medical expertise to effect conception.<sup>15</sup> However, where conception is effected by sexual intercourse the arrangement is usually referred to as informal or natural surrogacy. The term partial surrogacy is more frequently reserved for those instances where artificial insemination is utilised to effect conception.

Full or gestational surrogacy occurs when the commissioning parents (or donor(s)) provide the gametes. In this instance, the surrogate mother is not genetically related to the child.<sup>16</sup> This arrangement requires *in vitro fertilisation* in order to effect conception. 'This delicate procedure requires professional skill, special equipment and sophisticated hospital facilities'.<sup>17</sup> (This will also involve considerable financial input!)

In South Africa, a Commission was established to investigate the legal and ethical implications of surrogacy agreements. In September 1991, the Commission published a Working Paper for comment, and in 1993 submitted its final recommendations, with a

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<sup>13</sup> Douglas notes that partial surrogacy is most commonly used but as reproductive technologies become more reliable gestational surrogacy is likely to become more common. Gillian Douglas *Law, Fertility and Reproduction* (1991) 142

<sup>14</sup> This form of surrogate arrangement is sometimes called 'traditional' or 'natural' surrogacy.

<sup>15</sup> Michael D A Freeman 'Responding to the Reproductive Revolution Law Reform - Dilemmas and Difficulties'. In Sheila A M Mclean (ed) *Law Reform and Human Reproduction* (1992) 5

<sup>16</sup> The situation where the surrogate mother bears a child that is not genetically related to either herself or to the commissioning parents is sometimes referred to as a commissioned adoption

<sup>17</sup> Diederika Pretorius *Surrogate Motherhood: A Worldwide View of the Issues* (1992) 15

draft bill annexed thereto, to Parliament. In June 1995, the draft bill was gazetted, and a request was made for public comment. In the interim, the Report has been considered by the Parliamentary Ad Hoc Select Committee on the Report of the South African Law Commission on Surrogate Motherhood, whose recommendations in this regard are the subject of a Draft Final Report. The Parliamentary Ad Hoc Select Committee has recommended that the proposals of the South African Law Commission are not adopted, as the Commission's composition was not representative in respect of either race or gender, its consultation process was inadequate, and certain of its proposals are outdated. However, despite significant differences between the reports of the Commission and the Committee, the Committee nevertheless agrees with many of the Commission's recommendations. Accordingly, it is submitted that an examination of the Commission's proposals is still necessary.

Surrogacy is not a single event but a collaborative process, progressing from contract, to conception and gestation and finally to the birth of the child. Therefore, the writer has structured the discussion by dealing with those issues that are most likely to occur at each stage of the process.<sup>18</sup>

In the chapter entitled 'Regulating Surrogacy', the South African Law Commission's recommendation that surrogacy arrangements are regulated is explored. The regulation of surrogacy is not the only possible response by the potential lawmaker. Alternatives to regulation exist, and include prohibition and private ordering. The regulation of

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<sup>18</sup> Andrea E Stumpf 'Redefining Mother: A legal Matrix For New reproductive Technologies' (1986) 96 *Yale Law Journal* 187

surrogacy is a difficult task as it is almost impossible to provide for every situation and please all parties. However regulation has the advantage of conferring legitimacy on these arrangements, thereby making the control thereof that much easier.

Although the regulation of surrogacy arrangements implies recognition on the part of the lawmaker, it is possible to argue that certain aspects of surrogacy are unconstitutional. In this regard, the impact of the Constitution in the context of surrogacy is explored, and the relationship between the right to equal treatment and the right to reproductive freedom is explored.

In most surrogacy arrangements, the parties will reduce their agreement to writing, setting forth the terms of their respective rights and obligations. The chapter entitled 'Access to Surrogacy: The Contract and Its Surrounding Circumstances' examines the contents of a surrogacy contract. The legal effect of surrogacy agreements is also explored. Lawmakers often include conditions that restrict access to surrogacy arrangements to those people deemed suitable. Clearly, any evaluation of the suitability or otherwise of the candidates is fraught with difficulties. Meyerson questions the legitimacy of this requirement, as the law does not require persons capable of conceiving without assistance to prove their suitability for parenthood.<sup>19</sup>

Assuming the parties have reached an agreement, and have reduced it to writing, the surrogate mother is then impregnated, and carries the child to term. The extent to which the surrogacy agreement has a restrictive effect on the surrogate mother's personal

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<sup>19</sup> D Meyerson 'Surrogacy Agreements'. In Christina Murray (ed) *Gender and the New South African Legal Order* (1994) 139

freedom is explored. The commissioning parents have an interest in ensuring as far as possible the birth of a healthy child, but enforcement of this interest may result in an unconscionable invasion of the surrogate mother's right to bodily autonomy.

As already mentioned reproductive technology impacts on traditional notions of what constitutes a family. In the context of surrogate parenting a number of persons are able to claim the existence of a parent-child relationship. In the chapter 'Determining Parenthood', this aspect of surrogacy is discussed. The South African Law Commission permits only full surrogacy, and recommends direct parentage. This means that the commissioning parents are regarded from birth as the child's legal parents. The Parliamentary Ad Hoc Select Committee permits both partial and full surrogacy, and also recommends direct parentage in the case of full surrogacy. However, where partial surrogacy is used, the commissioning parents must apply for a transfer of parentage (also known as 'fast track' adoption). In this instance, the surrogate mother is regarded as the child's legal mother at birth, and must agree to transfer parentage to the commissioning parents.

Lastly, the extremely controversial aspect of commercial surrogacy is discussed. Opponents to the practice of commercial surrogacy argue that it will lead to the degradation of women and children, as well as their exploitation. On the other hand it is argued that surrogate mothers should be paid for their services, and that prohibition of payment is in itself exploitative. In addition, the role of commercial surrogacy agencies is explored. Although these agencies are generally regarded as undesirable, they are able to offer great assistance to the prospective parents and surrogate mother.



Serious thought should be given to the regulation of these agencies, as an alternative to prohibition.

As mentioned above, in the context of surrogacy, it is almost impossible to do justice to all parties, and it is just as difficult to protect people from the consequences of their actions. In regulating surrogacy, it is submitted that the lawmaker should guard against enacting rules that go too far in interfering with the rights of individuals to make decisions concerning personal matters. However, the potential for harm as a consequence of exploitative practices calls for a degree of control. Surrogacy arrangements do benefit those who are otherwise unable to have children, but the lawmaker should not permit the commissioning parents to satisfy their desire for a child at the expense of the surrogate mother or innocent third parties.

## CHAPTER TWO

### REGULATING SURROGACY ARRANGEMENTS

#### 2.1. Introduction

A legal dispensation, confronted by surrogate motherhood arrangements, can respond in a number of ways. Lawmakers can choose to do nothing, prohibit the activity, or recognise the rights of individuals to order their own arrangements. Another option is to regulate the activity. In other words, the state would create an 'exclusive mechanism by which an activity may be carried out'.<sup>20</sup> Freeman comments that among potential law reformers a 'shoot first, ask questions later' approach is all too common, especially in cases where legislation is a panicked response to a barely understood phenomenon'.<sup>21</sup> In order to avoid a too hasty response, 'the potential law reformer should ask whether law is needed or desirable at all'.<sup>22</sup>

It is submitted that the law should only interfere with the arrangements of private individuals, where such interference is necessary. Meyerson comments that 'freedom of contract and reproductive freedom are important aspects of personal freedom, and the law should respect them except to the extent that allowing them free sway harms

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<sup>20</sup> Alta R Charo 'United States: Surrogacy'. In Sheila A M Mclean (ed) *Law Reform and Human Reproduction* (1992) 241

<sup>21</sup> Michael D A Freeman 'Responding to the Reproduction Revolution: Law Reform - Dilemmas and Difficulties'. In Sheila A M Mclean (ed) *Law Reform and Human Reproduction* (1992) 4

<sup>22</sup> Michael D A Freeman 'Responding to the Reproduction Revolution: Law Reform - Dilemmas and Difficulties'. In Sheila A M Mclean (ed) *Law Reform and Human Reproduction* (1992) 4

third parties, or impacts unfairly on one of the parties to a bargain'.<sup>23</sup> Sedillo Lopez argues that whether or not the 'use of reproductive technology will be construed as within the zone of privacy, and, thus, a matter of individual autonomy, or a matter for grave social concern, will depend on the purpose to which technology is to be put'.<sup>24</sup> It is submitted that where surrogacy arrangements are utilised for a legitimate purpose, to address the problem of infertility, they should be permitted. Thus, any form of regulation should be aimed at protecting the interests of the parties involved, and in particular the rights of the child and of the surrogate mother.

After considering of the ways in which surrogate parenting could be addressed, the South African Law Commission concluded that regulation is the preferred legislative response. The Commission reasoned that a regulatory approach would draw on the experiences of other countries and would take into account, as far as is practically possible, a number of factors, including moral and ethical issues.<sup>25</sup> Essentially, the Commission hoped to formulate a 'careful approach with the best interests of the child as the overriding factor'.<sup>26</sup>

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<sup>23</sup> D Meyerson 'Surrogacy Agreements'. In Christina Murray (ed) *Gender and the New South African Legal Order* (1994) 145

<sup>24</sup> Antoinette Sedillo Lopez 'Privacy and Regulation of the New Reproductive Technologies: A Decision-Making Approach' (Summer 1988) 22(2) *Family Law Quarterly* 173 at 196-197

<sup>25</sup> Kilroe notes that a regulatory approach, in which legislative enactment seeks to regulate surrogacy agreements by balancing the interests of the child, the surrogate and the contracting party'. B A Kilroe *Surrogate Motherhood: A Regulated Approach* (no date) 1

<sup>26</sup> South African Law Commission *Report on Surrogate Motherhood* (Project 65: 1993) 146

The Commission considers the efficacy of applying existing law to surrogacy arrangements, but ultimately rejects this option, concluding that existing law is unable to adequately address the problems posed by surrogacy arrangements.<sup>27</sup>

The Parliamentary Ad Hoc Select Committee accepts that generally people favour the practice of surrogate parenting,<sup>28</sup> and notes that surrogacy is practised both formally and informally in this country.<sup>29</sup> The Committee agrees with the Commission that existing laws are inadequate as they were not promulgated with surrogate parenting in mind.<sup>30</sup> Accordingly, it also recommends that surrogacy arrangements are regulated.<sup>31</sup>

## **2.2. Approaches to Surrogacy Arrangements**

Regulation is by no means the only possible response to surrogacy. In addition to regulation, the following merit consideration:

- 1) a prohibitory approach whereby legislation prohibits surrogate arrangements and sanctions offenders;

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<sup>27</sup> South African Law Commission *Report on Surrogate Motherhood* (Project 65: 1993) 138

<sup>28</sup> para 6.1.2, Parliamentary Ad Hoc Select Committee on the Report of the South African Law Commission on Surrogate Motherhood *Draft Final Report* dated October 1998 at 33

<sup>29</sup> para 6.1.3, Parliamentary Ad Hoc Select Committee on the Report of the South African Law Commission on Surrogate Motherhood *Draft Final Report* dated October 1998 at 33

<sup>30</sup> para 6.2.1, Parliamentary Ad Hoc Select Committee on the Report of the South African Law Commission on Surrogate Motherhood *Draft Final Report* dated October 1998 at 33-34

<sup>31</sup> para 6.2.2, Parliamentary Ad Hoc Select Committee on the Report of the South African Law Commission on Surrogate Motherhood *Draft Final Report* dated October 1998 at 33

- 2) a private ordering approach whereby the privacy of individuals is paramount and, consequently, the individuals concerned will order their own arrangements; and
- 3) a status quo approach where existing laws based on the biological relationship between parent and child are applied to any problems posed by surrogacy.

The following discussion is aimed at providing an explanation of the most common legislative approaches to the problems posed by surrogacy arrangements.

### **2.2.1. Prohibitory Approach**

The prohibitory or punitive model is characterised by its hostility toward surrogacy arrangements. Legislative response based on this approach seeks to prohibit such arrangements, and to enforce the prohibition with criminal sanctions.

An example of a prohibitory approach is contained in the Waller Commission Report of the Australian state of Victoria,<sup>32</sup> which recommendations were incorporated in the *Infertility (Medical Procedures) Act*. The Act prohibits all surrogacy arrangements whether for compensation or not,<sup>33</sup> and provides that both altruistic and commercial surrogacy arrangements are void and unenforceable. In addition, where an arrangement is entered into for reward, the parties (commissioning parent(s), surrogate mother or

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<sup>32</sup> Victoria Committee to Consider the Social Ethical and Legal Issues Arising from In Vitro Fertilisation - *Interim Report* (1982); *Report on Donor Gametes in Vitro Fertilisation* (1983); *Surrogate Mothering* (1984); *Report on the Disposition of Embryos Produced by In Vitro Fertilisation* (1984)

<sup>33</sup> Part V of the *Infertility (Medical Procedures) Act*, 1984, which came into operation on 10 August 1986. In terms of section 30(1), surrogacy is prohibited 'whether formal or informal, and whether or not for payment or reward'

intermediary) are guilty of an offence.<sup>34</sup> The Act also prohibits any form of advertising with respect to surrogate arrangements.<sup>35</sup> Pretorius submits that this Act is unsatisfactory. It is not comprehensive enough in achieving its goal in preventing the practice of surrogacy, as it does not impose sanctions on altruistic surrogate arrangements.<sup>36</sup>

Another example of legislation incorporating prohibitory provisions can be found in the United Kingdom, where the *Surrogacy Arrangements Act* outlaws commercial surrogacy.<sup>37</sup> This Act was hastily promulgated in response to public outcry over the payment of a large sum of money by an American couple to a British surrogate mother.<sup>38</sup> The Act drew strongly on the recommendations of the Warnock Committee, which paid particular attention to the problem of commercial surrogacy.<sup>39</sup> While the Act does not declare all surrogate arrangements illegal, it is a criminal offence for intermediaries to act as agents for a fee. However, 'altruistic' surrogacy arrangements are permitted, and even where money is exchanged amongst the immediate parties to

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<sup>34</sup> Section 30, *Infertility (Medical Procedures) Act*, 1984

<sup>35</sup> Section 30(1), *Infertility (Medical Procedures) Act*, 1984

<sup>36</sup> Diederika Pretorius *Surrogate Motherhood: A Worldwide View of the Issues* (1994) 54

<sup>37</sup> Section 2, *Surrogacy Arrangements Act* (1985)

<sup>38</sup> *Re C* [1985] F.L.R. 846, also known as the 'Baby Cotton' case

<sup>39</sup> In July 1984, the Committee of Inquiry into Human Fertilisation and Embryology, which was established under the chairmanship of Dame Mary Warnock to examine the social, ethical and legal implications of developments in the field of human assisted reproduction, published its report. In the case of surrogacy, the Committee found the prospect of exploitation to far outweigh any potential benefit. The Committee was particularly concerned as to the consequences of commercial surrogacy and recommended that commercial surrogacy be prohibited. Committee of Inquiry into Human Fertilisation and Embryology *Report on the Committee of Inquiry into Human Fertilisation and Embryology* (Cmd. 9314: 1984)

the agreement they do not face criminal sanction so as to 'avoid children being born to mothers subject to the taint of criminality'.<sup>40</sup>

It is submitted that a prohibitory approach should be avoided. For a start, prohibition is not practical. The desire to have children is a powerful one, and it is foolish to try to wish away the reproductive technologies that may provide a solution to infertility. The technology exists, and is likely to be utilised - whether or not it is sanctioned by law. Surrogacy need not involve complicated medical technologies. Consequently, it is possible for the parties to arrange a surrogate pregnancy, without help from medical science. It is likely that outright prohibition would merely drive the practice of surrogacy underground, where the dangers faced by the parties are significantly increased.<sup>41</sup>

Meyerson comments that arguments favouring prohibition often refer to moral concerns.<sup>42</sup> Moral arguments are characterised by reference to highly speculative harms and a failure to evaluate any benefit that permitting the practice might have.<sup>43</sup> 'The reason they offer for forbidding paid surrogacy is not that it has harmful consequences which are unfair to the contracting parties, or harmful to third parties in any straightforward sense, but rather that it is, according to them, immoral, or degrading, or

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<sup>40</sup> para 8.19, Committee of Inquiry into Human Fertilisation and Embryology *Report on the Committee of Inquiry into Human Fertilisation and Embryology* (Cmnd. 9314:1984), quoted in Jo Bridgeman and Susan Millns *Feminist Perspectives on Law. Law's Engagement with the Female Body* (1998) 150

<sup>41</sup> M J Trebilcock *The Limits of Freedom of Contract* (1993) 53

<sup>42</sup> D Meyerson 'Surrogacy Agreements'. In Christina Murray (ed) *Gender and the New South African Legal Order* (1994) 123

<sup>43</sup> D Meyerson 'Surrogacy Agreements'. In Christina Murray (ed) *Gender and the New South African Legal Order* (1994) 123

that it expresses an inferior conception of human flourishing'.<sup>44</sup> It is submitted that in the absence of some other compelling factor, moral concerns are not sufficient to justify prohibition of surrogacy. Surrogacy arrangements provide a legitimate alternative for those people who are otherwise unable to have children.<sup>45</sup> Thus, to opt for prohibition on the basis that the practice may cause some hypothetical harm is too drastic a solution.

### 2.2.2. Private Ordering Approach

The private-ordering (or laissez faire) approach is in direct contrast to both the prohibitory and regulatory approaches. It sees the state's role as being facilitative of the arrangements of private individuals<sup>46</sup> A surrogacy contract, entered into voluntarily by consenting adults, should be enforceable, and the role of the state is to provide the means to enforce the agreement. This approach is advocated by those who believe that the law of contract provides a solution to the problems posed by surrogacy.<sup>47</sup> However, few jurisdictions are comfortable with this approach for the reason that there is an increased risk of both commercialism and exploitation.<sup>48</sup>

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<sup>44</sup> D Meyerson 'Surrogacy Agreements'. In Christina Murray (ed) *Gender and the New South African Legal Order* (1994) 123

<sup>45</sup> R Pretorius 'A Comparative Overview and Analysis of a Proposed Surrogate Mother Agreement Model' (1987) *CILSA* 275

<sup>46</sup> See Alta R Charo 'United States: Surrogacy'. In Sheila A M Mclean (ed) *Law Reform and Human Reproduction* (1993) 41-57. See also B A Kilroe *Surrogate Motherhood: A Regulated Approach* (no date)

<sup>47</sup> See Richard Epstein 'Surrogacy: The Case for Full Contractual Enforcement' (1995) 81 *Virginia Law Review* 2305-2341

<sup>48</sup> B A Kilroe *Surrogate Motherhood: A Regulated Approach* (no date) 31



### 2.2.3. Status Quo Approach

Traditionally, familial relationships are forged from biological or marital ties. Surrogacy upsets these assumptions as it permits parenthood to be construed as having genetic, biological and social components. This approach looks to existing legal precepts, and is essentially conservative in nature.<sup>49</sup> It advocates that the parent-child relationship should continue to be defined by a biological relationship. In essence, a blood relationship 'is the key to parenthood and all its accompanying rights and duties'.<sup>50</sup> The effect of adopting this response to surrogacy is that a 'brake' is placed on the practice.<sup>51</sup> The assignment of parentage to the biological mother is contrary to the intentions of the parties, which leaves the parties in a precarious position, and without legal remedies to their enforce their contractual rights should things go wrong.

### 2.2.4. Regulatory Approach

Many legislatures have opted for a regulatory model in which the state creates an 'exclusive mechanism by which an activity may be carried out'.<sup>52</sup> In short, the lawmaker stipulates the manner in which the surrogacy arrangement is to be carried out, and in this way not only controls it, but also legitimises it.

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<sup>49</sup> Michael D A Freeman 'Responding to the Reproduction Revolution: Law Reform - Dilemmas and Difficulties'. In Sheila A M Mclean (ed) *Law Reform and Human Reproduction* (1992) 5

<sup>50</sup> Michael D A Freeman 'Responding to the Reproduction Revolution: Law Reform - Dilemmas and Difficulties'. In Sheila A M Mclean (ed) *Law Reform and Human Reproduction* (1992) 5

<sup>51</sup> Michael D A Freeman 'Responding to the Reproduction Revolution: Law Reform - Dilemmas and Difficulties'. In Sheila A M Mclean (ed) *Law Reform and Human Reproduction* (1992) 5

<sup>52</sup> Alta R Charo 'United States: Surrogacy'. In Sheila A M Mclean (ed) *Law Reform and Human Reproduction* (1992) 241

The Ontario Law Reform Commission published its recommendations in 1985.<sup>53</sup> Dickens comments that its approach to surrogacy is an exercise in 'damage control', as it was felt that surrogacy would not go away.<sup>54</sup> Thus, the Ontario Law Reform Commission recommended that surrogacy be permitted where there is a genuine need, but that surrogacy arrangements should be subject to comprehensive regulation so as to 'legitimise and regulate the practice of surrogacy'.<sup>55</sup>

The Ontario Law Reform Commission recommended that the parties first submit their written contract to the relevant court for its approval. Although the parties have a measure of contractual freedom, it is recommended that the contract include certain terms, which are summarised by Pretorius as follows. The contract should contain provisions relating to:

- '1) health and life insurance for the prospective surrogate mother;
- 2) arrangements for the child should any one or both of the intended parents die or cease to live together;
- 3) arrangements regarding the manner in which the child should be surrendered after birth;
- 4) the right, if any, of the surrogate mother to obtain information regarding or to have contact with the child after birth;

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<sup>53</sup> Ontario Law Reform Commission *Report on Human Artificial Reproduction and Related Matters* (1985)

<sup>54</sup> Bernard Dickens 'Canada: The Ontario Law Reform Commission Project on Human Artificial Reproduction'. In Sheila A M Mclean (ed) *Law Reform and Human Reproduction* (1992) 84

<sup>55</sup> Diederika Pretorius *Surrogate Motherhood: A Worldwide View of the Issues* (1994) 37

- 5) the regulation of the surrogate mother's activities before and after conception, including dietary obligations; and
- 6) the conditions under which prenatal screening of the child may be justified or required, for example, ultrasound, fetoscopy, or amniocentesis'.<sup>56</sup>

In addition, the Commission makes recommendations for screening to assess the suitability of the parties to participate in a surrogacy agreement. It recommends that a Children's Aid Society play a role in assessing the suitability of the parties, and that the Court is able to review its decision, should there be a change in circumstance or if new information comes to light pertaining to the suitability of the commissioning parents. Furthermore, no payment may be made without prior approval of the court.<sup>57</sup>

The most controversial of its recommendations relates to the parentage of the child. The child is regarded as that of the commissioning parents from birth, and should immediately be surrendered to the commissioning parents. Should the surrogate mother refuse to do so, provision is made for the court to order delivery to the commissioning parents. In other words the surrogate mother can be compelled to surrender the child.<sup>58</sup>

In Israel, legislation was recently enacted to regulate surrogacy arrangements. The *Surrogate Agreements (Approval of Agreement and Status of the Child) Law* makes

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<sup>56</sup> Diederika Pretorius *Surrogate Motherhood: A Worldwide View of the Issues* (1994) 37-38

<sup>57</sup> Bernard Dickens 'Canada: The Ontario Law Reform Commission Project on Human Artificial Reproduction'. In Sheila A M Mclean (ed) *Law Reform and Human Reproduction* (1992) 72

<sup>58</sup> Bernard Dickens 'Canada: The Ontario Law Reform Commission Project on Human Artificial Reproduction'. In Sheila A M Mclean (ed) *Law Reform and Human Reproduction* (1992) 72

failure to comply with the provisions of the Law a criminal offence.<sup>59</sup> <sup>60</sup> Schuz comments that the parties must initially meet certain requirements before the agreement is approved by a Statutory Committee.<sup>61</sup> These requirements are as follows: that all the parties must be of age and resident in Israel;<sup>62</sup> that the surrogate mother must be unmarried (the Committee can approve the use of a married surrogate where there is no other choice of surrogate);<sup>63</sup> and that the surrogate mother must be unrelated to either of the commissioning parents.<sup>64</sup>

If the parties meet these criteria, they can then apply to the relevant Statutory Committee for its approval.<sup>65</sup> Schuz explains the procedure the parties must follow when making their application: 'The parties must attach to their application copy of the surrogacy agreement, a medical report confirming that the prospective mother cannot bear children or that pregnancy would seriously endanger her health; medical and psychological reports as to the suitability of all the parties to the agreement; confirmation from a psychologist or social worker that the prospective couple have

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<sup>59</sup> *Surrogate Agreements (Approval of Agreement and Status of the Child) Law 5746 - 1996*

<sup>60</sup> Section 19(10), *Surrogate Agreements (Approval of Agreement and Status of the Child) Law 5746 - 1996*

<sup>61</sup> Rona Schuz 'The Right to Parenthood: Surrogacy and Frozen Embryos' (1996) *International Survey of Family Law* 237 at 240

<sup>62</sup> Section 2(2), *Surrogate Agreements (Approval of Agreement and Status of the Child) Law 5746 - 1996*

<sup>63</sup> Section 2(3)(a), *Surrogate Agreements (Approval of Agreement and Status of the Child) Law 5746 - 1996*

<sup>64</sup> Section 2(3)(b), *Surrogate Agreements (Approval of Agreement and Status of the Child) Law 5746 - 1996*

<sup>65</sup> Schuz describes the Committee as comprising seven members - two gynaecological doctors, a doctor of internal medicine, a clinical psychologist, a social worker, a lawyer and a minister of the parties' religion. Rona Schuz 'The Right to Parenthood: Surrogacy and Frozen Embryos' (1996) *International Survey of Family Law* 237 at 241

received appropriate counselling including discussion of other possibilities for parenthood, and (where the surrogacy has been organised by an agency) the agreement with the agent'.<sup>66</sup> Once the Committee has approved the agreement, it may nevertheless reconsider its decision in the event of a substantial change of circumstances provided that conception has not yet taken place.<sup>67</sup>

Matters concerning procreative liberty are generally regarded as falling within the private sphere, and it would seem that the choice of an appropriate legislative response must to some extent be governed by the question of how far the state should be permitted to intervene in the affairs of private individuals. No freedom can be completely free from limitation. Therefore, it is submitted that where state control in the form of regulation will prevent harm, then regulation of an activity is acceptable. Dickens comments on the reasoning of the Ontario Law Reform Commission's approach are applicable: 'The Commissioners approached their task regarding surrogate motherhood in no sense as supporters of the practice, but as undertaking an exercise of damage control. Surrogate motherhood was seen as an option that could not be eliminated, or suppressed ... The risk that particularly poor women or vulnerable relatives might be overinduced, manipulated and abused to serve in surrogacy agreements seemed to be aggravated rather than prevented by rendering surrogate

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<sup>66</sup> Rona Schuz 'The Right to Parenthood: Surrogacy and Frozen Embryos' (1996) *International Survey of Family Law* 237 at 241

<sup>67</sup> Section 2(5)(c), *Surrogate Agreements (Approval of Agreement and Status of the Child) Law 5746 - 1996*

motherhood illegal and driving it underground into the hands of unscrupulous operators'.<sup>68</sup>

## 2.3. The Approach of the South African Law Commission

### 2.3.1. Introduction

It is clear from the content of its proposals, that the Commission has drawn upon the experiences of other jurisdictions in attempting to provide solutions to the problems posed by surrogacy. Despite the world-wide trend toward prohibition of surrogacy arrangements, the South African Law Commission has recommended that these arrangements be regulated. In doing so, the Commission has chosen to reject a prohibitory approach. However, the parties are not free to contract as and how they wish. It is recommended that the High Court approve only those pre-conception agreements that adhere to the provisions of the proposed bill.<sup>69</sup> Should an agreement fail to comply with same, the arrangement is of no legal effect, and consequently, is unenforceable.<sup>70</sup> Where there is compliance, the commissioning parents are to be

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<sup>68</sup> Bernard Dickens 'Canada: The Ontario Law Reform Commission Project on Human Artificial Reproduction'. In Sheila A M Mclean (ed) *Law Reform and Human Reproduction* (1992) 85

<sup>69</sup> The South African Law Commission provides that no surrogate motherhood agreement shall be valid unless 'the agreement is confirmed in writing by a court within whose area of jurisdiction the surrogate mother is domiciled or habitually residing. Clause 2(d), Schedule A to the South African Law Commission *Report on Surrogate Motherhood* (Project 65: 1993) '

The Court with jurisdiction is the High Court of South Africa. Clause 1, Schedule A to the South African Law Commission *Report on Surrogate Motherhood* (Project 65: 1993)

<sup>70</sup> The proposals provide that any 'surrogate motherhood agreement that does not comply with the provisions of this Act shall be invalid and any child born as a result of any action taken in execution of such an arrangement shall, subject to the provisions of section 5 of the *Status of Children Act*, 1987 (Act 82 of 1987), for all purposes be deemed to be the child of the woman that gave birth to that child'. Clause

regarded as the child's legal parents from birth, and if necessary the surrogate mother can be compelled to surrender the child to whom she has given birth.<sup>71</sup>

Before considering the precise contents of the Commission's proposals, it is prudent to examine its choice of approach, and to ask whether regulation is indeed the best option. The disadvantages of adopting a prohibitory approach, as well as those of a private ordering approach have already been canvassed in this chapter. It is submitted that prohibition is neither practical nor appropriate, as it ignores the fact that surrogacy has much to recommend it. By contrast, a private ordering approach allows individuals too much freedom, thereby increasing the possibility of commercialism and exploitation.

The Commission does consider the efficacy of the existing law with respect to surrogacy arrangements, but submits that existing law is unable to address the problems posed by surrogacy arrangements adequately. The Commission states that 'since the existing law is inadequate to cope with the problems surrounding surrogate motherhood it would be better to regulate the matter in such a way as to achieve legal certainty'.<sup>72</sup>

Nevertheless, it is argued that legislatures should avoid acting too hastily, and should attempt to clarify the law with regard to surrogate parenting within the framework of well established legal principles. Garrison states that legislatures 'should focus on

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8(2), Schedule A to the South African Law Commission *Report on Surrogate Motherhood* (Project 65: 1993)

<sup>71</sup> Clauses 8(1)(a)-(e), Schedule A to the South African Law Commission *Report on Surrogate Motherhood* (Project 65: 1993)

<sup>72</sup> South African Law Commission *Report on Surrogate Motherhood* (Project 65: 1993) 138

achieving compatibility with the family law principles governing parental agreements and custody/visitation and with the basic policy goals of the adoption statutes'.<sup>73</sup>

### 2.3.2. South Africa: Existing Law

#### 2.3.2.1. Legislation

What of existing legislation - is it truly as inadequate as the Commission fears? Certainly, no statute expressly addresses the question of surrogacy, although there is legislation that deals with assisted human reproduction technologies. However, it is uncertain to what extent these provisions are applicable in the case of a surrogacy arrangement. The following Acts are applicable, but their effect is piecemeal.

The *Human Tissue Act* permits the use of donor gametes for the purposes of artificial insemination.<sup>74</sup> Although this Act was not enacted to specifically deal with surrogacy it does not expressly exclude it from its sphere of operation.<sup>75</sup>

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<sup>73</sup> Martha Garrison 'Surrogate Parenting: What Should Legislatures Do?' (Summer 1988) 22(2) *Family Law Quarterly* 149 at 160-161

<sup>74</sup> *Human Tissue Act* 65 of 1983

<sup>75</sup> Artificial fertilisation is defined as being 'the introduction by other than natural means of a male gamete or gametes into the internal reproductive organs of a female person for the purpose of human reproduction, including a) the bringing together outside the human body of male and female gametes with a view to placing the product of a union of such gametes in a womb of a female person; or b) the placing of the product of a union of a male and a female gamete or gametes which have been brought together outside the human body, in the womb of a female person for such purposes'. The definition section does not specify whose gametes should be used. From this an inference can be made that the use of donor gametes is possible. The words 'a female person' in s 1(b) are again not specific and would not preclude embryo transfer'. Section 1, *Human Tissue Act* 65 of 1983



The *Children's Status Act* addresses the position of illegitimate children in South African law,<sup>76</sup> and regulates, *inter alia*, the status of a child born by means of artificial fertilisation. Provided that both the woman and her husband consent to the artificial fertilisation, the resultant child is the legitimate child of the couple to whom he or she is born.<sup>77</sup> The Act specifically provides for the termination of gamete donors' parental rights and duties.<sup>78</sup>

This implies that in the case of surrogate parenting, the surrogate mother and her husband are to be regarded as the child's legal parents. The Act expressly provides that 'no right, duty or obligation shall arise between any child born as a result of the artificial insemination of a woman and any person whose gamete or gametes have been used for such artificial insemination and the blood relations of that person, except where (a) that person is the woman who gave birth to that child; or (b) that person is the husband of such a woman at the time of such artificial insemination'.<sup>79</sup> This is contrary to the purpose of a surrogacy arrangement and places the commissioning parents in an invidious position. It is particularly troublesome in the case of full surrogacy, where the Act provides for the termination of all rights and duties that may arise between the child and the gamete donor or donors. Thus, the commissioning parents have no legal entitlement to the child. In addition, the surrogate mother is placed in a difficult position if the commissioning parents reject the child, as the law

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<sup>76</sup> *Children's Status Act* 82 of 1987

<sup>77</sup> Children born as a result of artificial insemination with donor sperm or ova are considered the legitimate children of the woman giving birth and her husband, provided that both the woman and her husband consent to same. Section 5(1)(a), *Children's Status Act* 82 of 1987

<sup>78</sup> Section 5(2)(a) & (b), *Children's Status Act* 82 of 1987

<sup>79</sup> Section 5(2)(a) & (b), *Children's Status Act* 82 of 1987

considers her to be the child's legal parent, despite the existence of a surrogacy agreement.

The *Child Care Amendment Act* makes it possible for commissioning parents to adopt a child who is genetically related to one or both of them.<sup>80</sup> Prior to the amendment, section 17 of the *Child Care Act* had a restrictive effect on any attempt by the commissioning parents to adopt the child as the section was worded in such a way as to make it impossible for a person to adopt a child 'born of' them.<sup>81</sup> It was, therefore, impossible for a parent to adopt his or her own child, a situation which is now permitted.

The *Child Care Act* prohibits money changing hands in the case of adoption, and makes it a criminal offence to give or receive payment.<sup>82</sup> Parallels exist between surrogacy and adoption, and prohibition of payment in this statute implies that payment of the surrogate mother for her services is likely to fall foul of these provisions.

The child would be registered as the legitimate child of the surrogate and her husband, which as mentioned above would be contrary to the wishes of the parties. Furthermore,

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<sup>80</sup> Section 7, *Child Care Amendment Act* 86 of 1991

<sup>81</sup> *Child Care Act* 74 of 1983

<sup>82</sup> The Act provides that 'no person shall, save as prescribed under the *Social Work Act* 1978 (Act No. 110 of 1978), give, undertake to give, receive or contract to receive any consideration, in cash or kind, in respect of the adoption of a child'. Section 24(1) *Child Care Act* 74 of 1983

In addition 'any person who contravenes any provision of subsection (1) shall be guilty of an offence and on conviction liable to pay a fine of R2000 or to imprisonment for a period not exceeding two years or both such fine and such imprisonment'. Section 24(2) *Child Care Act* 74 of 1983

the *Births and Deaths Registration Act* makes it a punishable offence to intentionally furnish false information when registering the birth of a child.<sup>83</sup>

This examination of the relevant legislation reveals that it is less than satisfactory. All parties to the arrangement are in a precarious position. Clearly, additional measures are needed to address the issues raised by surrogacy contracts. However, legislation is by no means the only source of potentially applicable law, and there has been some suggestion that the principles of the common law may provide some solutions. Those writers who adopt this view fall into two camps. One group sees surrogacy as the appropriate subject of the law of contract, whereas the other views surrogacy as being an issue for family law.

#### **2.3.2.2. The Law of Contract**

Surrogacy arrangements are characterised by an agreement that requires the active involvement of another woman to solve the infertility problems of the commissioning couple. The parties agree that the surrogate mother will conceive and carry a child to term (usually genetically related to at least one or both of the intended parents). The child is handed over at birth to the intended parents who then arrange to adopt the child. Thus, it could be said that the essence of the arrangement lies in contract. It is, therefore, logical to look to the existing principles of the law of contract in order to evaluate their potential efficacy with respect to surrogacy arrangements.

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<sup>83</sup> Section 31(1)(b), *Births and Deaths Registration Act* 51 of 1992

In the context of a surrogacy arrangement, the tension that exists between the right of the individual to contract as and how he or she pleases, and public policy is pronounced. As discussed above, it is feared that by allowing individuals complete freedom to enter surrogacy contracts will result both in exploitation and increased commercialism. However, for the right to individual autonomy to mean anything, lawmakers should be careful not to intervene too hastily in the arrangements of individuals.

The question of whether or not surrogacy arrangements are legally enforceable contracts has received much attention. Pretorius discusses the validity of surrogacy contracts and concludes that these arrangements may well be *contra bonos mores*.<sup>84</sup> A contract is *contra bonos mores* if its purpose is immoral or where it is against public policy,<sup>85</sup> and is only valid if it does not contravene an Act of Parliament or other statutory provision and is not considered *contra bonos mores*.<sup>86</sup> The Courts have established categories of contracts which are traditionally regarded as being against public policy, and thus void. These categories include contracts which are injurious to marriage, as well as contracts which encourage unlawful acts.<sup>87</sup> Surrogacy arrangements give rise to many concerns, but contracts which include the following obligations may well be *contra bonos mores*:

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<sup>84</sup> Pretorius suggests that commercial, not altruistic surrogate contracts, will most likely be found to be *contra bonos mores* and thus unenforceable. Altruistic surrogacy arrangements 'pose no threat to the public or the public morals, especially since it is mostly utilised in a family relationship or a relationship between close friends'. She does argue that the surrogate mother should be entitled to receive compensation for necessary expenses and possibly for loss of income. Diederika Pretorius *Surrogate Motherhood: A Worldwide View of the Issues* (1992) 95

<sup>85</sup> Diederika Pretorius *Surrogate Motherhood: A Worldwide View of the Issues* (1992) 82

<sup>86</sup> Diederika Pretorius *Surrogate Motherhood: A Worldwide View of the Issues* (1992) 81

- 1) an agreement which provides for the permanent transfer of parental rights; and
- 2) an agreement to compensate a person for terminating their parental rights.

Of importance is the notion of severability of contracts. If it is possible to separate the provisions that are void from the other contractual provisions, then these remaining obligations may still be enforceable, provided that these terms are reasonable.<sup>88</sup> If this doctrine is found to be applicable in the case of surrogacy contracts (and there seems to be no reason why it should not), then this may mean that a court could strike out the offending provision(s), and uphold the rest of the contract, which would otherwise be void.

However, those courts which have been faced with the prospect of pronouncing on the validity of surrogacy contracts, have been reluctant to do so.<sup>89</sup> The Californian case of *Johnson v Calvert* is an exception, as the court upheld the surrogacy agreement, and in effect specifically enforced its terms.<sup>90</sup>

The Court was swayed by the commissioning parents' intention to be parents. In terms of Californian law, both the surrogate mother and the commissioning mother were able to adduce evidence supporting their claims to parentage. The Court took into

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<sup>87</sup> Diederika Pretorius *Surrogate Motherhood: A Worldwide View of the Issues* (1992) 82

<sup>88</sup> Pretorius considers the test for reasonableness and refers to the case of *Magna Alloys & Research (SA) (Pty.) Ltd v Ellis* 1984 (4) SA 874 (A). The Court will determine what is reasonable not only between the parties but will also consider the public interest at the time of the action. Diederika Pretorius *Surrogate Motherhood: A Worldwide View of the Issues* (1992) 94

<sup>89</sup> For example, see *Re C* [1985] F.L.R. 846. See also *In The Matter of Baby M* 217 N.J. Super. 313, 525 A 2d 1128 1132 Ch Div (1987), *aff'd in part, rev'd in part In The Matter of Baby M* 109 N.J. 396 537 A 2d 1227 1234 (1988)

consideration the commissioning mother's intention to bring the child into the world and raise it as her own. Panelli J (Lucas CJ, Mosk, Baxter, George and Arabian JJ concurring) held that 'when one woman is the genetic mother of a child and a different woman is its gestational mother, the issue of who is the child's 'natural mother' at law is to be resolved by enquiring into the parties' intentions as manifested in the surrogacy agreement. The woman who intended to procreate the child - she who intended to bring about the birth of a child who she intended to raise as her own - is the natural mother under California law'.<sup>91</sup> The application of a test to determine parentage based on the intent of the respective parties results in the enforcement of the contract, as the parties will always intend at the time of contracting for the commissioning parents to be vested with parentage.<sup>92</sup>

A surrogacy contract will contain provisions that set out the parties expectations as to the manner in which the arrangement will proceed. The contract will usually contain a number of essential provisions relating to the conception of the child, the surrogate mother's conduct during the pregnancy, payment of the surrogate mother, and the parties' arrangements regarding the child's surrender. Assuming that the contract is of legal effect, the enforcement of its terms could cause difficulty because of the personal nature of the contract.

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<sup>90</sup>*Johnson v Calvert* 851 P 2d 766 (1993)

<sup>91</sup> Jo Bridgeman and Susan Millns *Feminist Perspectives on Law. Law's Engagement with the Female Body* (1998) 162

<sup>92</sup>Jo Bridgeman and Susan Millns *Feminist Perspectives on Law. Law's Engagement with the Female Body* (1998) 165

In terms of the principles of contract an aggrieved party is entitled to claim specific performance. However, the Court has a discretion to refuse the claim.<sup>93</sup> In *Farmers' Co-op Society (Reg) v Berry*,<sup>94</sup> Innes J stated that '*prima facie* every party to a binding agreement who is ready to carry out his own obligation under it has a right to demand from the other party, so far as it is possible, a performance of his undertaking in terms of the contract. ... It is true that the Courts will exercise a discretion in determining whether or not decrees of specific performance will be made. They will not, of course be issued where it is impossible for the defendant to comply with them. And there are many cases in which justice between the parties can be fully and conveniently done by an award of damages. But that is a different thing from saying that a defendant who has broken his undertaking has the option to purge his default by the payment of money. ... The election is rather with the injured party, subject to the discretion of the Court'.<sup>95</sup>

The Court will exercise its discretion to refuse a claim for specific performance, where performance is impossible or where an order would cause undue hardship. Thus, 'where it would operate unreasonably hardly on the defendant, or where the agreement giving rise to the claim is unreasonable, or where the decree would produce injustice, or would be inequitable under all the circumstances',<sup>96</sup> the court would refuse to grant an order for specific performance. The courts have been reluctant to grant orders for specific performance where the contract is for personal services. This is not to say that

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<sup>93</sup> R H Christie *The Law of Contract in South Africa* 3 ed (1996) 579

<sup>94</sup> 1912 AD 343

<sup>95</sup> *Farmers' Co-op Society (Reg) v Berry* 1912 AD 343 at 350

<sup>96</sup> *Haynes v Kingwilliamstown Municipality* 1951 (2) SA 371 (A) at 378H - 379A

such an order will always be refused where the contract is for personal services. However, the merits of each case must be examined to see whether the circumstances are such that the aggrieved party's claim for an order of specific performance should be refused.<sup>97</sup> In *National Union of Textile Workers v Stag Packings (Pty) Ltd*,<sup>98</sup> the Court corrected the tendency to regard the court's reluctance to grant an order for specific performance of an employment contract as a rule of law. The Court has good reason for generally refusing to grant such an order as a contract of employment requires the performance of services of a continuing nature. In addition the parties must continue to maintain a personal relationship. Consequently, there is a constant danger that disputes will arise and the Court is in no position to supervise these disputes to prevent them from arising or to adjudicate them once they have arisen.<sup>99</sup>

As mentioned above, surrogacy contracts are of a personal nature. Should the court refuse to grant an order for specific performance because to do so would, for example, be inequitable or because the court is unable to supervise performance, the aggrieved party has a claim for damages. However, it is debatable whether either the commissioning parents or the surrogate mother would regard damages as adequate compensation should the other party be in breach of the contract.

Nevertheless, some writers maintain that the law of contract has some advantages. An approach which recognises the validity of the underlying contract introduces certainty

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<sup>97</sup> R H Christie *The Law of Contract in South Africa* 3 ed (1996) 585

<sup>98</sup> 1982 (4) SA 151 (T)

<sup>99</sup> R H Christie *The Law of Contract in South Africa* 3 ed (1996) 585



to the arrangement. In the event of a dispute, the first question is one of validity. Once this hurdle has been successfully negotiated, the next step is to interpret the contract and thereafter to apply it. This should be a mechanical process.<sup>100</sup> Following these steps introduces certainty to the arrangement, and from the outset the parties will be aware of their rights and remedies should a breach of contract occur.

In addition, a binding contract 'sorts out the parties who choose to participate in the venture in the first place'.<sup>101</sup> Thus, if the parties are aware that there is no escape from the consequences of their pact, they will think carefully before entering into it.

How successfully does the law of contract solve to the problem of surrogacy arrangements? Broekhuijsen-Molenaar examines several worst case scenarios in the context of Dutch law, and argues that contractual principles are able to deal with most scenarios. She admits that certain aspects of surrogacy contracts are likely to be contrary to public policy,<sup>102</sup> but raises the notion of severability of contracts, thereby concluding that absolute avoidance of the contract need not take place as long as there is no order of specific performance for an act that offends public policy. She argues that in the context of surrogacy contracts the main obligation involves the child's surrender

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<sup>100</sup>Brinig comments that '[u]nder a contract law analysis, the issues are whether the arrangement between the parties satisfies the requirements for an enforceable contract, and if so, how the contract is to be interpreted, applied, and enforced'. Margaret Friedlander Brinig 'A Materialistic Approach to Surrogacy: Comment of Richard Epstein's Surrogacy: The Case for Full Contractual Enforcement' (1995) 81 *Virginia Law Review* 2377 at 2377 n 1

<sup>101</sup> Richard A Epstein 'Surrogacy: The Case for Full Contractual Enforcement' (1995) 81 *Virginia Law Review* 2305 at 2339

<sup>102</sup> A M L Broekhuijsen-Molenaar 'Contractual Aspects of Surrogate Motherhood in the Netherlands' 502

by the surrogate mother. This obligation should not be specifically enforceable for reasons of public policy, and a claim for damages would be an adequate remedy.<sup>103</sup>

What is to happen if the surrogate mother refuses to surrender the child? The commissioning parents may have a claim for damages, calculated according to contractual principles.<sup>104</sup> (When damages are calculated according to positive interesse, one compares the situation in which the party currently finds himself with the situation he would have found himself in should the contract have been fulfilled.)

If the prospective parents refuse to accept the child, the surrogate mother could claim damages from them (again the measure of damages to be calculated according to positive interesse), as she is now responsible for maintaining a child she would otherwise not have had to support if the contract had been fulfilled.<sup>105</sup>

Broekhuijsen-Molenaar argues that provisions relating to the payment of the surrogate mother is a secondary obligation, and as such the surrogate mother should be allowed to claim compensation for the pain and effort of her pregnancy. In other words, provisions relating to payment of the surrogate mother in excess of actual costs incurred would be valid and enforceable.<sup>106</sup>

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<sup>103</sup> A M L Broekhuijsen-Molenaar 'Contractual Aspects of Surrogate Motherhood in the Netherlands' 505

<sup>104</sup> A M L Broekhuijsen-Molenaar 'Contractual Aspects of Surrogate Motherhood in the Netherlands' 505

<sup>105</sup> A M L Broekhuijsen-Molenaar 'Contractual Aspects of Surrogate Motherhood in the Netherlands' 505

<sup>106</sup> A M L Broekhuijsen-Molenaar 'Contractual Aspects of Surrogate Motherhood in the Netherlands' 506

She also maintains that any restraints on the lifestyle and conduct of the surrogate mother during pregnancy are invalid and unenforceable for reasons of public policy. Lastly, provisions restraining the surrogate mother from aborting the child are most certainly invalid and wholly unenforceable, because to enforce such a term would constitute an unacceptable restriction of individual freedom.<sup>107</sup>

It appears from the above that with some ingenuity the principles of contract can be utilised in order to cope with any, or at least most, of the worst case scenarios likely to arise from surrogacy contracts. However, it is arguable whether the law of contract does provide the parties with adequate remedies to the problems of surrogate parenting. The courts are reluctant to grant the remedy of specific performance in the context of a contract for personal service, and it is doubtful whether the parties would regard damages as an adequate remedy in the case of breach, particularly where a surrogate mother refuses to hand over the child.

### **2.3.2.3. Family Law:**

Advocates of a static approach (that is, leaving things as they are) argue that the problems presented by surrogacy should be resolved according to the established principles of family law. Garrison writes that '[t]he novelty of surrogate parenting has seemingly blinded many commentators to the ordinariness of the basic legal issues - a

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<sup>107</sup> A M L Broekhuijsen-Molenaar 'Contractual Aspects of Surrogate Motherhood in the Netherlands' 506

contract between unmarried parents regarding a future stepparent adoption, and the custody/visitation rights of these same parents. These are not altogether novel issues, and there are potentially applicable legal principles, derived both from case law and statutes'.<sup>108</sup> The established principles of family law are most likely to be utilised when deciding issues pertaining to custodial and access rights.

An area of particular concern in the context of surrogate parenting is the determination of parenthood. The relevant principles of the common law were formulated before the advent of advanced medical technologies that allow the separation of parentage into its genetic, gestational and social components.

The effect of common law presumptions and relevant legislation is that a surrogate mother and her husband are regarded as the child's legal parents,<sup>109</sup> and, are unable to hand the child to the commissioning parents. (It is generally contra bonos mores to enter into a contract in which one agrees to terminate one's parental rights. Moreover, it is a criminal offence to abandon one's child).<sup>110</sup> In order to terminate their parental rights, the birth mother and her husband would have to put the child up for adoption in the usual manner.

Even where the commissioning father is the biological father, he has no inherent rights to the child. If the surrogate is married her husband is irrebuttably presumed to be the

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<sup>108</sup> Martha Garrison 'Surrogate Parenting: What Should Legislatures Do?' (Summer 1988) 22(2) *Family Law Quarterly* 149 at 157

<sup>109</sup> Section 5, *Children's Status Act* 82 of 1987

<sup>110</sup> Section 50(1)(b), *Child Care Act* 74 of 1983

father, provided that he has consented to the procedure.<sup>111</sup> Furthermore, the *Children's Status Act* expressly provides that no right, duty, or obligation shall arise between a child born of the artificial fertilisation of a woman and the gamete donor except where the donor is the birth mother or is the husband of the birth mother.<sup>112</sup> Thus, the biological father has no automatic right of access, guardianship or custody to the child, although he may apply to court for these rights.<sup>113</sup> The application will not be granted unless the court is satisfied that the granting of the application is in the child's best interests.<sup>114</sup>

Incorporated in the principles of family law is the notion that whenever a decision is made concerning a child, its best interests are to be taken into account. The standard of 'best interest' is well established in our law, and in determining the best interests of a child, 'the Court will take into account all the circumstances into account in deciding what is in the best interests of the child: the age, state of health and social and financial circumstances of each of the spouses; their characters, temperaments and past behaviour towards the child, the age, sex, state of health and character of the child and its educational and religious needs and personal preferences. The conduct of the spouse will be taken into account in so far as it may be indicative of his or her suitability to look after the child'.<sup>115</sup>

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<sup>111</sup> Section 5 (1)(a), *Children's Status Act* 82 of 1987

<sup>112</sup> Section 5(2), *Children's Status Act* 82 of 1987

<sup>113</sup> Section 2(1), *Natural Fathers of Children Born out of Wedlock Act* 86 of 1997

<sup>114</sup> Section 2(2), *Natural Fathers of Children Born out of Wedlock Act* 86 of 1997

<sup>115</sup> Nazeem M I Goolam 'Constitutional Interpretation of the 'Best Interests' Principle in South Africa in Relation to Custody'. Paper delivered at the Ninth World Conference of the International Society of Family Law, Durban, 28-31 July 1997 at 8

Not only is the best interests test reflected in South African family law, it is now enshrined in our Constitution which states that in every matter concerning a child its best interests are of paramount importance.<sup>116</sup> In a recent case involving a father's right of access to his illegitimate child, Wunsch J observed that the international perspective is to only enforce parental rights where it is in the child's best interests.<sup>117</sup>

However, application of the best interests test can be problematical. The test is to a large extent undetermined in that it does not have a fixed content. This can be advantageous as it affords the court a certain amount of flexibility in deciding which factors it should give weight to in a particular instance. However, Goolam evaluates the test as applied in South Africa and criticises it for its eurocentricity. 'In a multicultural society such as South Africa's, the indeterminacy of the 'best interests' principle is exacerbated. The divergent social values of our diverse cultures will result in differing approaches to the principle'.<sup>118</sup>

The best interests standard is closely linked to the concept of children's rights. King criticises the emphasis placed on children's rights. He argues that there is a perception that the mere existence of children's rights will result in an utopian situation where all

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<sup>116</sup> Section 28(2), *Constitution of the Republic of South Africa Act* 108 of 1996

<sup>117</sup> *Chodree v Vally* 1996 (2) SA 28 (WLD)

<sup>118</sup> Nazeem M I Goolam 'Constitutional Interpretation of the 'Best Interests' Principle in South Africa in Relation to Custody'. Paper delivered at the Ninth World Conference of the International Society of Family Law, Durban, 28-31 July 1997 at 10

the evils that children face will fall away.<sup>119</sup> He maintains that children's rights are formulated in such a way as to go beyond the scope of what may be called law. 'They are formulated as law, because there is no other mode (or code) for modern society to make generally available its fears and hopes for children and their future and, at the same time, to hold out the possibility of allaying those fears and realising those hopes'.<sup>120</sup> In short, children's rights are unable to prevent a child from suffering injustice. King notes that children's rights are most effective where the law is able to offer procedural protections.

Goolam discusses other criticisms of children's rights. He describes a rights approach as being unnecessarily adversarial (the interests of the child have preference to that of its parents),<sup>121</sup> and suggests that a child's interests may be better served by developing the obligations of those charged with the care of children.<sup>122</sup>

The application of family law to surrogacy arrangements amounts to the adoption of an approach based on the status quo. The surrogate mother and her husband would be regarded as the child's legal parents and the commissioning parents would have to adopt the child in order to become its legal parents. This approach does not recognise the parties' intentions. Should the surrogate mother refuse to relinquish the child, the

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<sup>119</sup> Michael King 'Against Children's Rights' (1996) *Acta Juridica* 28 at 29

<sup>120</sup> Michael King 'Against Children's Rights' (1996) *Acta Juridica* 28 at 38

<sup>121</sup> Nazeem M I Goolam 'Constitutional Interpretation of the 'Best Interests' Principle in South Africa in Relation to Custody'. Paper delivered at the Ninth World Conference of the International Society of Family Law, Durban, 28-31 July 1997 at 11

<sup>122</sup> Nazeem M I Goolam 'Constitutional Interpretation of the 'Best Interests' Principle in South Africa in Relation to Custody' Paper delivered at the Ninth World Conference of the International Society of Family Law, Durban, 28-31 July 1997 at 11

commissioning parents can theoretically apply to court for an order awarding them custody of the child. They would have to establish that this is in the best interests of the child. The surrogate mother would be in a very strong position as not only is she the biological mother but would presumably be able to demonstrate adequate parenting skills. Unless, the surrogate mother was unfit, it is doubtful that the 'best interests' test would operate in favour of the commissioning parents. Furthermore, family law principles do not protect the surrogate mother should the commissioning parents decide that they no longer wish to take the child.

#### **2.4. Conclusion**

It is hard to deny that in certain circumstances, surrogacy arrangements are valuable. Although surrogacy arrangements may be abused, the right of individuals to enter into these arrangements should be protected. The role of the lawmaker is to ensure that any abuse is prevented. A blanket prohibition goes too far in preventing abuse as it would deny certain individuals the opportunity to procreate. It is submitted that in the context of surrogate parenting, a regulatory approach is the only practical solution.

An examination of existing legislation and of the common law suggests that the situation in South Africa is unsatisfactory. Present legislation is applicable to surrogacy arrangements by chance and not by design, with the result that the position of all parties to the arrangement is precarious.

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While our common law may well be able to provide some solutions to the problems raised by surrogate motherhood arrangements, too much reliance on common law principles may be disadvantageous. A contractual approach assumes equality of bargaining power, which may not be the case. Furthermore, the remedy of specific performance may not be available to the parties. As previously stated, the court may be reluctant to enforce contracts for personal services, especially where it is difficult for the court to enforce its decision.<sup>123</sup>

The nature of the surrogacy arrangements suggests that damages will not adequately compensate the parties in the case of breach. For example, where the commissioning parents decide that they no longer wish to take the child, the surrogate mother is left with the responsibility of raising the child. Although the commissioning parents can provide compensation to the surrogate mother for the maintenance of the child, this can not be regarded as adequate compensation for the additional responsibilities the surrogate mother will have to assume in raising the child.

Family law is another possible solution, but one that is unlikely to provide certainty. It is submitted that litigation should be avoided at all costs. Uncertainty may lead to increased litigation, which is undesirable. Yet another criticism is that family law leaves too much to the discretion of the judiciary. The issues that can arise out of a surrogacy arrangement are complex and may have consequences far beyond the lives of the immediate parties to the arrangement and as such are not easily justiciable. Moreover, family law does not recognise the intentions of the parties to the

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<sup>123</sup> B A Kilroe *Surrogate Motherhood: A Regulated Approach* (no date) 13

arrangement, which leaves the parties in a precarious position should there be a breach of the contract.

Thus in the interests of all concerned, it would seem sensible that surrogacy arrangements are comprehensively regulated by means of legislation. The legislation should first and foremost address the question of the legality of surrogate arrangements, and should also provide clear instructions to the parties with regard to how they are to go about ensuring compliance with the rules in order to facilitate the process and avoid unnecessary litigation.

## **CHAPTER THREE**

### **SURROGACY ARRANGEMENTS AND HUMAN RIGHTS**

#### **3.1. Introduction**

The Constitution has had an enormous impact on every aspect of South African law.<sup>124</sup>

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<sup>124</sup> The *Constitution of the Republic of South Africa Act 108 of 1996* replaced the Interim Constitution



It contains a Bill of Rights,<sup>125</sup> which guarantees the human rights of all persons and affirms such democratic values as human dignity, equality and freedom.<sup>126</sup> While a right is a statement of entitlement which may give rise to an action in law, it may also serve as a blueprint for the ideal society. Thus, 'a claim of right can transmit a powerful message concerning the kind of society we want to live in, the kinds of relations among people we wish to foster, and the kind of behaviour that is to be praised or blamed'.<sup>127</sup>

Almost without exception, legal recognition of family relationships is founded on biological kinship. As surrogacy poses a challenge to the precepts on which kinship is based and has far reaching implications for women and children, the impact of the Constitution on the proposals of the South African Law Commission,<sup>128</sup> and on those contained in the draft final report of the Parliamentary Ad Hoc Select Committee on the Report of the South African Law Commission, must be examined.<sup>129</sup>

The rights contained within the Bill of Rights clearly bind the State vis-à-vis the individual.<sup>130</sup> In other words state action must be in accordance with the provisions

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<sup>125</sup> The Bill of Rights is contained in Chapter 2 of the *Constitution of the Republic of South Africa Act* 108 of 1996

<sup>126</sup> Section 7(1), *Constitution of the Republic of South Africa Act* 108 of 1996 provides that '[t]his Bill of Rights is the cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom'

<sup>127</sup> Elizabeth M Schneider 'The Dialectics of Rights and Politics: Perspectives from the Women's Movement'. In Martha Albertson Fineman and Nancy Sweet Thomadsen (eds) *At the Boundaries of Law - Feminism and Legal Theory* (1991) 312

<sup>128</sup> South African Law Commission *Report on Surrogate Motherhood* (Project 65: 1993)

<sup>129</sup> Parliamentary Ad Hoc Select Committee on the Report of the South African Law Commission on Surrogate Motherhood *Draft Final Report* dated October 1998

<sup>130</sup> Section 8(1), *Constitution of the Republic of South Africa Act* 108 of 1996 provides that '[t]he Bill of Rights applies to all law and binds the legislature, the executive, the judiciary, and all organs of state'

contained in the Bill of Rights. However, individuals are also bound by the Bill of Rights vis-à-vis other individuals (in so far as the nature of the right enables an individual to be bound).<sup>131</sup> In the case of surrogate motherhood arrangements it is likely that reliance will be placed on certain of the provisions of the Constitution in actions both against the State and other individuals.

### **3.1.1. Rights of Potential Application in the Context of Surrogacy Arrangements**

There are a number of rights which are of potential application to surrogate motherhood arrangements, including (but not limited to) the right to equality,<sup>132</sup> the right to human dignity,<sup>133</sup> the right to freedom and security of person,<sup>134</sup> the right to reproductive autonomy,<sup>135</sup> the right not to be subjected to slavery, servitude or forced labour,<sup>136</sup> the right of privacy,<sup>137</sup> and the rights of children.<sup>138</sup>

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<sup>131</sup> Section 8(2), *Constitution of the Republic of South Africa Act 108 of 1996* provides that '[a] provision of the Bill of Rights binds natural and juristic persons if, and to the extent that, it is applicable, taking into account the nature of the right and of any duty imposed by the right'

<sup>132</sup> Section 9, *Constitution of the Republic of South Africa Act 108 of 1996*

<sup>133</sup> Section 10, *Constitution of the Republic of South Africa Act 108 of 1996*

<sup>134</sup> Section 12, *Constitution of the Republic of South Africa Act 108 of 1996*

<sup>135</sup> Section 12(2), *Constitution of the Republic of South Africa Act 108 of 1996*

<sup>136</sup> Section 13, *Constitution of the Republic of South Africa Act 108 of 1996*

<sup>137</sup> Section 14, *Constitution of the Republic of South Africa Act 108 of 1996*

<sup>138</sup> Section 28, *Constitution of the Republic of South Africa Act 108 of 1996*

The equality provision states that everyone is equal before the law and has the right to equal protection and benefit of the law.<sup>139</sup> The State may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, and birth.<sup>140</sup> Also, individuals may not discriminate against other individuals on any of the grounds enunciated above.<sup>141</sup> In addition, section 9(5), which provides that discrimination on one or more of the grounds listed in subsection (3) is unfair unless it can be shown that the discriminatory act is in that instance actually fair. Thus, once an individual has established the existence of a right, it is incumbent on the opposing party to show why that right should be limited.

The right to human dignity states that everyone has inherent dignity, and the right to have their dignity respected and protected.<sup>142</sup> The right to freedom and security of person guarantees everyone the right to bodily and psychological integrity, which includes the right (a) to make decisions concerning reproduction; (b) to security in and control over their body; and (c) not to be subjected to medical or scientific experiments without their informed consent.<sup>143</sup> No one may be subjected to slavery, servitude or

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<sup>139</sup> Section 9(1), *Constitution of the Republic of South Africa Act 108 of 1996* provides that '[e]veryone is equal before the law and has the right to equal protection and benefit of the law'.

<sup>140</sup> Section 9(3), *Constitution of the Republic of South Africa Act 108 of 1996*

<sup>141</sup> Section 9(4), *Constitution of the Republic of South Africa Act 108 of 1996*

<sup>142</sup> Section 10, *Constitution of the Republic of South Africa Act 108 of 1996*

<sup>143</sup> Section 12(2), *Constitution of the Republic of South Africa Act 108 of 1996*



forced labour.<sup>144</sup> Everyone has the right to privacy.<sup>145</sup> Section 28 lists a number of rights with regard to children, and section 28(2) enshrines the principle of the best interests of the child, providing that a child's best interest is of paramount importance in every matter concerning the child.<sup>146</sup>

### 3.1.2. Limitation Clause

The rights contained in the Constitution are not absolute. Once a party has established the existence of a right and its infringement, it falls to the opposing party to show why the right should be limited. These rights are subject to the limitation clause which sets out the factors which a court must take into account in deciding whether the infringement or limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.<sup>147</sup>

### 3.1.3. Interpreting the Bill of Rights

When interpreting a provision contained within the Bill of Rights, a court or tribunal is directed to interpret a provision in such a way as to promote the underlying principles

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<sup>144</sup> Section 13, *Constitution of the Republic of South Africa Act 108 of 1996* .

<sup>145</sup> Section 14, *Constitution of the Republic of South Africa Act 108 of 1996* provides that '[e]veryone has the right to privacy, which includes the right not to have - (a) their person or home searched; (b) their property searched; (c) their possessions seized; or (d) the privacy of their communications infringed'.

<sup>146</sup> Section 28(2), *Constitution of the Republic of South Africa Act 108 of 1996*

<sup>147</sup> Section 36, *Constitution of the Republic of South Africa Act 108 of 1996* provides that '[t]he rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors including (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and the extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose'.

of an open and democratic society based on human dignity, equality and freedom.<sup>148</sup> The Constitution encourages reference to sources of law outside South Africa itself such as human rights treaties and international covenants.<sup>149</sup> Thus, the provision implies that reference must be made to the contents of international covenants, such as the *Convention on the Rights of the Child*,<sup>150</sup> and the *United Nations Convention on the Elimination of All Forms of Discrimination Against Women*.<sup>151</sup>

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<sup>148</sup> Section 39(1)(a), *Constitution of the Republic of South Africa Act* 108 of 1996

<sup>149</sup> Section 39(1), *Constitution of the Republic of South Africa Act* 108 of 1996 provides that when interpreting the Bill of Rights, 'a court, tribunal or forum (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) must consider international law; and (c) may consider foreign law'.

<sup>150</sup> The Convention was ratified by South Africa on 16 June 1995 and as such our domestic legislation and policy will have to comply with the norms and standards set by the Convention. Nazeem M I Goolam 'Constitutional Interpretation of the 'Best Interests' Principle in South Africa in Relation to Custody'. Paper delivered at the Ninth World Conference of the International Society of Family Law, Durban, 28-31 July 1997 at 3

<sup>151</sup> This Convention was ratified by Parliament in 1995

### 3.2. Application of the Bill of Rights to Surrogacy Arrangements

In this section a number of rights of potential application to surrogacy arrangements are examined. In doing so it is hoped to demonstrate that the Constitution, in fact, provides powerful arguments both for and against the practice of surrogacy.

Those opposed to surrogacy argue that despite the existence of legislation, which appears to be gender neutral, the social and legal control of women's reproductive capacities has been a principal source of gender inequality. Surrogacy does not pose the same problems for men as it does for women. In other words, equality is not always about treating individuals alike. Surrogacy allows women, as a class, to be turned into something for use by others. While a single case of surrogacy may not be exploitative and may even benefit the surrogate mother, it is possible to argue that the commodification of reproductive capacities may have negative implications for women and children in general. It may contribute to gender inequality in that it reinforces the view of women as second class citizens. Thus, it is argued, the law should take steps to ensure that morally irrelevant characteristics (for example, race, religion, gender) are not transformed into systematic sources of social disadvantage.<sup>152</sup>

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<sup>152</sup> See Cass R Sunstein 'Neutrality in Constitutional Law (With Special Reference to Pornography, Abortion, and Surrogacy)' (Jan 1992) 92(1) *Columbia Law Review* 1

On the other hand, it is possible to argue that the harms discussed above are speculative, and the advantages of affording an infertile couple the opportunity to become parents should not be ignored.<sup>153</sup>

### 3.2.1. Equality Clause

The equality clause is central to the Bill of Rights.<sup>154</sup> In a decision of the Constitutional Court, O'Regan J states that 'it is not surprising that equality is a recurrent theme in the Constitution. As this Court has said in other judgements, the Constitution is an emphatic rejection of our past in which inequality was systematically entrenched'.<sup>155</sup> The Constitutional Court has stressed that gender discrimination should not take a backseat to racial discrimination.<sup>156</sup>

The provisions of section 9 are of crucial importance to unmarried persons wishing to utilise surrogate motherhood arrangements. This aspect is examined more closely elsewhere but, briefly, the South African Law Commission proposes that only heterosexual married couples have access to surrogate motherhood arrangements. This would appear to be an infringement of the equality clause as unmarried persons as well

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<sup>153</sup> See D Meyerson 'Surrogacy Agreements'. In Christina Murray (ed) *Gender and the New South African Order* (1994) 121

<sup>154</sup> Section 9, *Constitution of the Republic of South Africa Act 108 of 1996*

<sup>155</sup> *Brink v Kitshoff NO* 1996 (6) BCLR 752 (CC) at para 34

<sup>156</sup> O' Regan J states that, '[a]lthough in our society, discrimination on grounds of sex has not been as visible, nor as widely condemned, as discrimination on grounds of race, it has nevertheless resulted in deep patterns of disadvantage. These patterns of disadvantage are particularly acute in the case of black women, as race and gender discrimination overlap. That all such discrimination needs to be eradicated from our society is a key message of the Constitution'. *Brink v Kitshoff NO* 1996 (6) BCLR 752 (CC) at para 44

as homosexual and lesbian couples are discriminated against by virtue of their marital status and/or sexual orientation. Thus, in order to restrict access to surrogacy to married heterosexual couples, the State would have to establish that the limitation is reasonable and justifiable in an open and democratic society.<sup>157</sup> It should be noted that the regulations to the *Human Tissue Act* have been amended to allow unmarried women access to artificial fertilisation techniques.<sup>158</sup>

The Parliamentary Ad Hoc Select Committee appears to recognise that access to surrogacy arrangements should not be restricted to married couples, as it proposes that any competent and suitable person or persons may commission a surrogacy arrangement.<sup>159</sup> This indicates that a person's marital status should not prevent them from becoming a commissioning parent. However, the requirement that the commissioning person or persons be 'suitable' is problematic. How is suitability to be determined? It is possible that this requirement may be interpreted in such a way that lesbian and homosexual couples are prevented from being commissioning parents. For example, in the United Kingdom, although there is no formal requirement that a woman be married or have a male partner to receive infertility treatment from a licensed centre, section 13(5) of the *Human Fertilisation and Embryology Act* requires that '[a] woman shall not be provided with treatment services unless account has been taken of the welfare of the any child who may be born as a result of the treatment (including the need of that child for a father), and of any other child who may be

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<sup>157</sup> Section 36, *Constitution of the Republic of South Africa Act* 108 of 1996

<sup>158</sup> *Human Tissue Act* 65 of 1983

<sup>159</sup> para 6.4.2.3, Parliamentary Ad Hoc Select Committee of the Report of the South African Law Commission on Surrogate Motherhood *Draft Final Report* dated October 1998 at 36

effected by the birth'.<sup>160</sup> This section acts as a screening device in respect of access to infertility treatment. It should be noted that Parliamentary Ad Hoc Committee expressly provides that marital status or sexual orientation should not disqualify a person or persons from becoming a parent or parents.<sup>161</sup> (The Committee notes the view of the National Party which is that surrogacy should not be available to homosexual persons, whether single or in a relationship).<sup>162</sup>

Section 7(2), indicates a commitment to substantive equality. The section reads as follows, 'the State must respect, protect, promote and fulfil the rights in the Bill of Rights'. Thus, there is a duty upon the State to see that real equality as opposed to formal equality is achieved.

The commitment to substantive equality is also of importance as far as women's rights are concerned. Formal equality in the form of gender neutral rules or laws can often disguise bias. An approach that is premised on formal equality, seeks to treat all individuals alike. In the context of women's rights, this means that women are to be treated the same as men, with no regard to women's specificities. Sunstein objects to this particular view of equality as 'these notions see discrimination only in explicit legal

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<sup>160</sup> Section 13(5), *Human Fertilisation and Embryology Act* 1990

<sup>161</sup> para 6.4.2.4, Parliamentary Ad Hoc Select Committee of the Report of the South African Law Commission on Surrogate Motherhood *Draft Final Report* dated October 1998 at 36

<sup>162</sup> para 6.4.2.4, Parliamentary Ad Hoc Select Committee of the Report of the South African Law Commission on Surrogate Motherhood *Draft Final Report* dated October 1998 at 36

distinctions based on race and sex, and never in legal rules that operate to disadvantage blacks and women because they are rooted in white or male norms'.<sup>163</sup>

That this idea of equality is inherently unfair is illustrated by the approach of the United States Supreme Court when deciding cases concerned with reproductive choice. The Court has reasoned that as pregnancy is unique to women, any decision concerning pregnancy cannot be the appropriate subject of the equality clause.<sup>164</sup> Thus, it has based its decisions on the right to privacy under the due process clause of the fourteenth amendment.<sup>165</sup> In doing so the Court failed to acknowledge that, historically, the dichotomy between the public (work) and private (home) sphere has contributed to the oppression of woman.<sup>166</sup>

### 3.2.2. The Right to Make Decisions Concerning Reproduction

This right may be relied upon by persons wishing to utilise surrogacy to procreate.<sup>167</sup> However, reliance on this provision is subject to challenge on a number of grounds relating to harm suffered by the parties to a surrogacy arrangement and to society as a whole.

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<sup>163</sup> Cass R Sunstein 'Neutrality in Constitutional Law (With Special Reference to Pornography, Abortion, and Surrogacy)' (Jan 1992) 92(1) *Columbia Law Review* 1 at 2

<sup>164</sup> See Cass R Sunstein 'Neutrality in Constitutional Law (With Special Reference to Pornography, Abortion, and Surrogacy)' (Jan 1992) 92(1) *Columbia Law Review* 1

<sup>165</sup> See Cass R Sunstein 'Neutrality in Constitutional Law (With Special Reference to Pornography, Abortion, and Surrogacy)' (Jan 1992) 92(1) *Columbia Law Review* 1

<sup>166</sup> Diana Majury 'Strategizing in Equality' In Martha Albertson Fineman and Nancy Sweet Thomadsen (eds) *At the Boundaries of Law - Feminism and Legal Theory* (1991) 324

<sup>167</sup> Section 12(2), *Constitution of the Republic of South Africa Act* 108 of 1996

Of interest is that the Bill of Rights makes separate provision for the right to make decisions concerning reproduction. As mentioned above, the notion of equality is central to an understanding of the Bill of Rights, and in fact, it is possible to consider many of the other rights as specific manifestations of this clause. Certainly, the right to reproductive autonomy is closely linked to that of equality, and in so far as women's rights are concerned, these rights are co-dependent.

Birenbaum writes that 'as long as women are socially disadvantaged by their childbearing capacity and the gender roles entrenched in South African society, it remains impossible for most South African women to make free and uncoerced decisions concerning reproduction'.<sup>168</sup> In other words, women need to achieve substantive equality for the right to reproductive autonomy to mean anything.

Reproductive freedom is still a key issue in the ongoing struggle to redress the oppression of women. As with all the reproductive technologies, surrogacy raises questions about the role of women in society. Stanworth voices her fears with regard to reproductive technologies as follows. 'In contemporary societies, where women not only bear children but are defined predominantly in terms of their reproductive capacities, what impact will changes in reproduction that may accompany the new technologies have on women's lives?'<sup>169</sup>

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<sup>168</sup> Joanna Birenbaum 'Contextualising Choice: Abortion, Equality and the Right to make Decisions Concerning Reproduction' (1996) 12(3) SAJHR 485 at 490.



Reproductive technologies are not only concerned with the prevention or control of fertility. Stanworth identifies four groups of reproductive technologies, two of which are of concern for the purposes of this discussion. The first is aimed at fertility control, and is in direct contrast to the group concerned with conceptive technologies.<sup>170</sup> While the section would clearly apply to those technologies aimed at fertility control, it is less clear that it provides a right to procreate as and how one pleases. Since the enactment of the Constitution, the issue of reproductive rights has yet to receive much legislative attention.<sup>171</sup> While the law is committed to reproductive freedom, it is debatable whether at present reproductive technologies which promote pregnancy are a priority. In countries such as South Africa, where resources are scarce, assisted reproduction will be eclipsed by 'the harsh realities of population control through one parent families, semi-voluntary sterilisation programmes and debates about the value of lactation, family planning and infanticide'.<sup>172</sup>

Whether or not the right to reproductive freedom encompasses a right to use reproductive technologies to conceive has to some extent been considered by writers in the context of the American constitutional law. Robertson has argued that it may prove as harmful to deny a person the right to have a certain experience, as it is to force an

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<sup>169</sup> Michelle Stanworth 'Introduction'. In M Stanworth (ed) *Reproductive Technologies: Gender, Motherhood and Medicine* (1987) 3

<sup>170</sup> Stanworth identifies two other groups of reproductive technologies which are concerned with 'the management of labour and childbirth', and with 'improving the health and the genetic characteristics of foetuses and of newborns'. Michelle Stanworth 'Introduction'. In M Stanworth (ed) *Reproductive Technologies: Gender, Motherhood and Medicine* (1987) 10-11.

<sup>171</sup> Of note are the new laws with respect to abortion, which are contained in the *Choice on Termination of Pregnancy Act* 92 of 1997. Furthermore, the regulations to the *Human Tissue Act* 65 of 1983 have been amended so as to allow single women access to artificial reproductive technologies.

<sup>172</sup> M D A Freeman 'Responding to the Reproductive Revolution: Law Reform - Dilemmas and Difficulties'. In Sheila A M Mclean *Law Reform and Human Reproduction* (1992) 4

unwanted experience upon them. He argues that the American Constitution protects the right to procreate and that this right encompasses not only the freedom to avoid reproduction but would also extend to the 'freedom to reproduce when, with whom and by what means one chooses'.<sup>173</sup> However, while the American Supreme Court has considered the right to procreate, its decisions have been confined to the issues of state ordered sterilisation, contraception and abortion. Nevertheless, these cases establish that the individual (regardless of his or her marital status) is to some extent protected from unwarranted state intervention with his or her right to procreative freedom.<sup>174</sup> Although this is an ill defined area of the law, Robertson argues that the right to reproductive freedom confers a positive right to procreate.<sup>175</sup>

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<sup>173</sup> John A Robertson 'Procreative Liberty and the Control of Conception, Pregnancy and Childbirth' (1983) 69(3) *Virginia Law Review* 405 at 406

<sup>174</sup> In the earlier half of this century the United States Supreme Court considered two cases on the legality of state ordered sterilisation. Although, in *Buck v Bell* 274 U.S. 22 (1927), the Court found that sterilisation of mentally retarded persons without their consent violated neither the due process nor the equal protection clause of the American Bill of Rights, this decision is now largely regarded as being incorrect. In *Skinner v Oklahoma* 316 U.S. 535 (1942), the Court found that a criminal statute that ordered the sterilisation of criminals who had repeated felony convictions but which exempted 'white collar' criminals fell foul of the equal process provision contained in the Bill of Rights. The Court commented on the importance of procreative liberty. This right 'involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race ... [The person sterilised by the State] is forever deprived of a basic liberty.' (at 541) In *Griswold v Connecticut* 381 U.S. 479 (1965), the Supreme Court found that a ban on the use of contraceptives by the state of Connecticut violated marital privacy. However, the case of *Eisenstadt v Baird* 405 U.S. 438 (1972) extended this reasoning to unmarried persons. The Court stated at 453 that 'if the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.' In *Roe v Wade* 410 U.S. 113 (1973), the Court considered the right to terminate a pregnancy. In *Cleveland Board of Education v La Fleur*, 414 U.S. 632 (1974), the Court remarked at 639-640 that, 'this court has long recognised that personal choice in matters of marriage and family life is one of the liberties protected by the due process clause of the fourteenth amendment'. Anon 'Reproductive Technology and the Procreation Rights of the Unmarried' (1986) 99 *Harvard Law Review* 1936 at 675-677

<sup>175</sup> John A Robertson 'Procreative Liberty and the Control of Conception, Pregnancy and Childbirth' (1983) 69(3) *Virginia Law Review* 405 at 406

If one assumes that the right to reproductive freedom does go so far as to confer a positive right to procreate by using reproductive technologies, is there any reason to limit the right? In other words assuming the existence of a *prima facie* right, is there reason to limit the right in terms of section 36?

Many of the proponents of surrogate motherhood employ the libertarian arguments of freedom of choice and bodily autonomy to justify surrogate arrangements. Gary Skaloff, the lawyer who represented the commissioning parents in the *Baby M* case,<sup>176</sup> argued from a libertarian perspective when he stated that if you 'prevent women from becoming surrogate mothers and deny them the freedom to decide, ... you are saying that they do not have the ability to make their own decisions, but you do. It is being unfairly paternalistic and it is an insult to the female population of this country'.<sup>177</sup> In other words, proponents of this point of view advocate 'identical treatment in all circumstances'.<sup>178 179</sup>

Feminist writers have criticised this sort of reasoning because it ignores the realities of inequality, and as such promotes formal, not substantive, equality. It disregards the fact

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<sup>176</sup> *In the Matter of Baby M* 525 A.2d 1128, 217 NJ Super. 313 (Superior Ct. Chancery Division 1987), reversed on appeal, 537, A.2d 1227, 109 NJ 396 (NJ S. Ct. 1988)

<sup>177</sup> Gena Corea 'Junk Liberty'. In H Patricia Hynes (ed) *Reconstructing Babylon: Women and Technology* (1990) 166.

<sup>178</sup> Majury argues that an 'equal treatment' model requires absolute adherence to gender neutrality in the wording of rules and laws, and to a lesser extent, in their effect. Under an equal treatment analysis, any acknowledgement of women's specificity is characterised as "special treatment" and dismissed as practically dangerous and theoretically inconsistent'. Diana Majury 'Strategizing in Equality' In Martha Albertson Fineman and Nancy Sweet Thomadsen (eds) *At the Boundaries of Law - Feminism and Legal Theory* (1991) 321

<sup>179</sup> Diana Majury 'Strategizing in Equality' In Martha Albertson Fineman and Nancy Sweet Thomadsen (eds) *At the Boundaries of Law - Feminism and Legal Theory* (1991) 324

that men cannot fall pregnant, and ignores the differences between women and men and the complex nature of the unequal treatment experienced by women.

Although it is possible to argue that adults should be able to exercise their rights to procreative liberty as and how they like, it has been argued that the liberty to do so results in the commodification and objectification of women, and is the inevitable result of an inherently unequal relationship. Corea goes as far as to label these rights as 'junk'.<sup>180</sup> It is argued that this view is harmful to women as a class, and is the antithesis of what our society should be striving towards. Although the rhetoric inherent in criticism of the libertarian point of view may seem extreme, the argument highlights the problems of adopting a libertarian philosophy where the principle of self determination confronts feminist theories of the common good, in other words where the benefit experienced by the individual is considered of lesser importance than the interests of women as a class. In the case of surrogacy, many feminist writers feel that, while the individuals concerned may benefit from the arrangement (the commissioning parents get a desperately wanted child and the surrogate earns money or the act of carrying a child for others fulfils some other need of the surrogate mother), it is not clear that surrogate arrangements offer much toward the advancement of women as a class, and may well even have an adverse effect.<sup>181</sup>

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<sup>180</sup> Gena Corea 'Junk Liberty'. In H Patricia Hynes (ed) *Reconstructing Babylon: Women and Technology* (1990) 182.

<sup>181</sup> Alta R Charo 'United States: Surrogacy'. In Sheila A M Mclean (ed) *Law Reform and Human Reproduction* (1992) 230.

Sunstein suggests that any discourse, based on the right to liberty, and which favours surrogacy, is potentially flawed.<sup>182</sup> In order to understand the nature of the flaw it is essential to understand the difference between formal and substantive equality. Implicit in the notion of substantive equality is an awareness of the reality of difference. Formal equality treats everyone alike, but displays no awareness of difference. Thus, if one applies a formal notion of equality, it becomes possible for unfair discrimination to occur despite the application of a law in a seemingly gender neutral manner. While the recognition of individual liberty would certainly favour the use of surrogacy, and discourage state intervention into the private sphere, a more substantive notion of equality makes it clear that surrogacy may cause harm to women and children in general. As Sunstein argues, 'the social legitimation of exchanging women's reproductive capacities, and the children who result, in return for cash',<sup>183</sup> may well affect attitudes towards women thereby perpetuating inequality by keeping women in the position of 'second class citizens'. Comparing surrogacy to slavery, Sunstein points out that it is impossible to be free without being equal, and it is therefore possible to argue that surrogate arrangements undermine the equality right by creating an image of women as reproductive vehicles.<sup>184</sup>

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<sup>182</sup> Cass R Sunstein, 'Neutrality in Constitutional Law (With Special Reference to Pornography, Abortion and Surrogacy)' (Jan 1992) 92(1) *Columbia Law Review* 1 at 44-48

<sup>183</sup> Cass R Sunstein, 'Neutrality in Constitutional Law (With Special Reference to Pornography, Abortion and Surrogacy)' (Jan 1992) 92(1) *Columbia Law Review* 1 at 46-47

<sup>184</sup> Cass R Sunstein, 'Neutrality in Constitutional Law (With Special Reference to Pornography, Abortion and Surrogacy)' (Jan 1992) 92(1) *Columbia Law Review* 1 at 44-48

### 3.2.3. The Right to Human Dignity and The Right not to be Subjected to Slavery, Servitude or Forced Labour

These rights might be used to advocate the prohibition of surrogacy on the ground that it is inconsistent with the core of human dignity to allow one human being to be used to satisfy the desire of another human being, albeit where that desire is for a child.<sup>185</sup> Raymond writes that 'it violates the core of human dignity to hire a woman's body for the breeding of a child so that someone else's genes may be perpetuated'.<sup>186</sup> She argues that if humans are not always allowed to do as they like with their bodies (for example, there are laws which regulate organ donation as there is some feeling that unrestricted practices may lead to the unwanted commodification of body parts), then why should the practice of surrogacy be allowed.<sup>187</sup>

Arguments relating to the commodification of women and children may find support in the right not to be subjected to slavery, servitude or forced labour. It is feared that to allow the practice of surrogacy is to lend support to the view that women are no more than reproductive vessels. With this further degradation of women's status, it is feared that exploitative practices are sure to follow. This fear is not wholly unfounded when considered in the light of certain statements made by so called 'baby brokers'. One writer tells of plans to set up a women's clinic in Mexico with the aim of luring women into participating in surrogacy arrangements. The motive was purely financial -

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<sup>185</sup> Sections 10 and 13, *Constitution of the Republic of South Africa Act* 108 of 1996

<sup>186</sup> Janice G Raymond 'Testimony Before the House Judiciary Committee, State of Michigan'. In H Patricia Hynes (ed) *Reconstructing Babylon: Women and Technology* (1990) 163.

<sup>187</sup> Janice G Raymond 'Testimony Before the House Judiciary Committee, State of Michigan'. In H Patricia Hynes (ed) *Reconstructing Babylon: Women and Technology* (1990) 163

surrogate mothers in the United States are just too expensive. There are greater profits to be had in a poorer country.<sup>188</sup>

There is also some concern that surrogacy may become yet another factor in the international traffic of women and children. In other words, real reproductive slavery or servitude may occur. Again accounts tend to show that these fears are not wholly unfounded. In India, a study documented parents selling unborn female children into prostitution.<sup>189</sup> Nor should the practice of inter-country adoption be ignored. In Sri Lanka, for example, so called 'baby farms' are known to operate and it is estimated that approximately 1500 children leave the island per annum as a result of baby trafficking.<sup>190</sup>

A further consideration is that surrogacy in a first world country such as the United Kingdom raises different concerns to its utilisation in countries where women's rights are less firmly established. Women in poorer countries are generally less well educated about their rights and have fewer resources available to them in resisting exploitative practices.

However, these arguments can be criticised as being highly speculative and, as such, not sufficient to justify the prohibition of surrogacy, especially where other measures

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<sup>188</sup> Gena Corea 'Junk Liberty' In H Patricia Hynes (ed) *Reconstructing Babylon: Women and Technology* (1990) 183 n 5.

<sup>189</sup> Janice G Raymond 'The International Traffic in Women: Women Used in Systems of Surrogacy and Reproduction'. In H Patricia Hynes (ed) *Reconstructing Babylon: Women and Technology* (1990) 117.

<sup>190</sup> Janice G Raymond 'The International Traffic in Women: Women Used in Systems of Surrogacy and Reproduction'. In H Patricia Hynes (ed) *Reconstructing Babylon: Women and Technology* (1990) 118-119.

may be employed to control prospective harm. Nonetheless, the concerns mentioned above are grave and merit careful consideration when formulating an approach to surrogacy.

#### **3.2.4. The Right to Privacy**

The right to privacy recognises that every person is entitled to a sphere of personal autonomy in which the law may not interfere. While the clause makes specific mention of certain situations in which the individual is entitled to rely on this right, it is not exhaustive and does not exclude someone from relying on it in order to defend their right to utilise surrogation. In the United States, decisions on reproductive autonomy have in fact been decided on the grounds of privacy and not on equality.

The privacy right is by its very nature individualistic and as such does not take into account communal rights. Thus, in the context of surrogacy, it ignores the harmful effects of surrogacy on women and children. The division of life into public and private, hides the nature of the relationship between these two spheres. They are not independent realms but are actually co-dependent. In fact, the very existence of a Bill of Rights is recognition of the reality of this dependence.

Nevertheless, it is submitted that this right is unlikely to be utilised in the context of surrogacy, as individuals wishing to assert their right to reproductive freedom are more likely to do so under section 12 of the Constitution.



However, should an application be brought under section 14, much of the reasoning that surrogacy poses risks to the interests of women and children, and which I have already discussed above, is applicable.

### **3.2.5. Children's Rights**

Section 28(2) provides that in all matters concerning children, their best interests are of paramount importance.<sup>191</sup> This particular clause is of great importance in the context of surrogacy arrangements as surrogacy is frequently challenged as potentially harmful to the children involved.

In addition to the discussion surrounding the harm present in the commodification of children, one can question whether a surrogacy arrangement can be in the best interests of the child to be born as a result thereof. One should not forget the interests of the children exposed to a surrogacy arrangement. Little is known about the bonding process that exists between mother and child during pregnancy and it is possible that the separation of the child from its birth mother could be extremely traumatic to the child, causing considerable psychological problems at some future stage.

What of the surrogate mother's other children? It is possible that their sense of security would be undermined after the loss of their sibling. Even if one decides that the potential for harm is too speculative, the question arises as to how it is possible to ensure that a child's interests are best protected.

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<sup>191</sup> *Constitution of the Republic of South Africa Act 108 of 1996*

The Constitution does not provide a definition of 'best interest' and, thus, when interpreting this phrase our courts will have to look elsewhere. While the concept of 'best interest' is well established in South African law, it is criticised as being eurocentric, in that it fails to take into account the perceptions of other cultures as to what is in the best interests of a child.<sup>192</sup> In other words beliefs with respect to the best interests of a child differ from one culture to another. In future, however, mediators, judges and cultural councils' commissioners will have to take into account the culturally diverse approach to the issue in South Africa if the values that underlie an open and democratic society are to be truly promoted and respected'.<sup>193</sup> In other words beliefs with respect to the best interests of a child differ from one culture to another.

King criticises the emphasis placed on children's rights. He argues that children's rights are formulated in such a way as to go far beyond the scope of what may be called law. 'They are formulated as law, because there is no other mode (or code) for modern society to make generally available its fears and hopes for children and their future and, at the same time, to hold out the possibility of allaying those fears and realising those hopes'.<sup>194</sup> In short, children's rights are not necessarily able to prevent a child from suffering injustice. King notes that children's rights are most effective where the law is able to offer procedural protections. If this is so, then officials such as the Family

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<sup>192</sup> Nazeem M I Goolam 'Constitutional Interpretation of the 'Best Interests' Principle in South Africa in Relation to Custody' . Paper delivered at the Ninth World Conference of the International Society of Family Law, Durban, 28-31 July 1997 at 1

<sup>193</sup> Nazeem M I Goolam 'Constitutional Interpretation of the 'Best Interests' Principle in South Africa in Relation to Custody' . Paper delivered at the Ninth World Conference of the International Society of Family Law, Durban, 28-31 July 1997 at 1

<sup>194</sup> Michael King 'Against Children's Rights' (1996) *Acta Juridica* 28 at 38

Advocate are vital in ensuring that the objectives of section 28 are achieved. The Family Advocate already plays a role in assisting the courts in their assessment of matters that involve children. The Family Advocate can ensure that the court has enough information to make a decision that is in the interests of the child. Of course, the Office of the Family Advocate can only be effective if it is adequately staffed, its personnel properly trained and supervised, and is allocated sufficient resources.

### **3.3. Conclusion**

While the above discussion can provide no concrete answers to the problems posed by surrogacy, it is hoped that it shown that our Constitution has considerable application in the in the context of surrogate motherhood. Not only is the practice of surrogacy itself capable of challenge in terms of the Constitution, but many of the Commission's proposals fall foul of the provisions contained in the Bill of Rights and as such need to be reconsidered.

Adherents to the view that surrogacy is an unwelcome practice will find support in the principle of equality contained within the Bill of Rights. Women in South Africa have suffered, and continue to suffer discrimination on account of their sex. If one looks at the historical context of the right to reproductive choice, it is primarily aimed at providing South African women with access to the means to control their own fertility, thereby allowing women control over their lives. It is submitted that equality must be the precursor of reproductive freedom. Thus, without substantive equality, reproductive freedom cannot truly exist.

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Proponents of surrogacy are able to rely on the rights of reproductive choice and the right to privacy in order to support the use of surrogacy. In their favour is the fact that surrogacy is not a widespread practice (for one the cost is just too prohibitive), and that, as the nature of the harms envisaged to women and children are so speculative, its benefits may well justify its continued existence. It is also possible to argue that with proper regulation, surrogacy will not be so harmful as to justify its prohibition. In other words it is possible to argue that with, proper control, the practice of surrogacy is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

As mentioned previously, the Constitution does impact on the recommendations of the South African Law Commission and, consequently, many of its proposals need to be reconsidered. The Commission's proposals are premised on a traditional view of the family. Only heterosexual married couples are entitled to access to surrogacy arrangements. This clearly amounts to discrimination on the grounds of sexual orientation or marital status. The surrogate mother must be a married, divorced or widowed woman. This too may amount to discrimination on the ground of marital status.<sup>195</sup> The Commission proposes that the commissioning parents be regarded as the legal parents of the child and, where the surrogate mother is unwilling to part with the child provides that she can be compelled to do so. It is uncertain whether this will always be in the best interests of the child, and accordingly, it is possible to argue that the recommendation infringes section 28(2) of the Constitution.

The Parliamentary Ad Hoc Select Committee's has made its recommendations since the Constitution's enactment. The Committee proposes that commissioning parents must be suitable persons, but that neither sexual orientation nor marital status are to play any role in determining suitability.

By way of conclusion, it is submitted that in a perfect world there would be no need for surrogacy. The practice of surrogacy is fraught with pitfalls, and its potential for harm should not be underestimated. The discomfort displayed by academics, judicial and medical commissions of enquiry, courts and legislators alike with respect to this topic is testimony to its potential to harm. However, the needs of those who are infertile should not be forgotten, and it may be that they should be accommodated as far as it is possible. The Constitution provides the framework against which these competing interests can be evaluated in order to ensure that a fair and equitable outcome is achieved.

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<sup>195</sup> Of note is the amendment to the regulations to the *Human Tissue Act* 65 of 1983, which allow single woman to undergo artificial reproductive techniques. Regulation 8(1) deleted by Government Notice R1354 in Government Gazette 18362 of 17 October 1997

## **CHAPTER FOUR**

### **ACCESSING SURROGACY ARRANGEMENTS: THE CONTRACT AND ITS SURROUNDING CIRCUMSTANCES**

#### **4.1. The Legal Recognition of Surrogacy Contracts**

Surrogacy is a collaborative process whereby a person or a couple engage a woman (very often a stranger) to have a child for that person or that couple. The parties (the commissioning parent or parents and the surrogate mother) generally draw up a contract, which contract would include a full statement of the parties undertakings, and, in particular, would provide for the surrender of the child to the commissioning parent or parents.

In addition to the aforementioned terms, a surrogacy contract is likely to make provision for the death or divorce of the commissioning couple, the conduct of the surrogate mother during pregnancy, the circumstances in which the foetus may be aborted, the commissioning parents' responsibilities should the child be born mentally or physically handicapped, the parties' right to publicise the event, access rights (if any) of the surrogate mother to the child, and compensation payable to the surrogate mother.

Although the parties may enter into a surrogacy agreement, the validity of the contract is uncertain. If the contract is of no legal effect, an aggrieved party will have no

recourse against the defaulting party. In practice this may result in a situation where the commissioning parents are unable to compel the surrogate mother to surrender the child, or a surrogate mother is burdened with an unwanted child.

Surrogacy arrangements are sometimes argued to be *contra bonos mores* and, thus, void. The reasons for their apparent illegality has been debated at length, but, in short, relate to the beliefs that surrogacy is inconsistent with human dignity, and that it encourages commercialism and exploitation, particularly of women and children.

The argument that surrogacy is inconsistent with human dignity (because surrogacy commodifies women's reproductive capacities and encourages the perception that babies are assets to be bought and sold) has been suggested as a reason for resistance to the recognition of these contracts.<sup>196</sup> Surrogacy has also been criticised for encouraging a view of women that is undesirable. Recognition of surrogacy agreements may encourage the perception that women are objects for use by others.<sup>197</sup> While a particular surrogacy arrangement may benefit the surrogate mother, it can be argued that commodifying reproductive capacities may have negative implications for women as a class,<sup>198</sup> and may contribute to gender inequality as it reinforces the view of women as second class citizens.<sup>199</sup>

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<sup>196</sup> See D Meyerson 'Surrogacy Agreements'. In Christina Murray (ed) *Gender and the New South African Legal Order* (1994)

<sup>197</sup> Cass R Sunstein 'Neutrality in Constitutional Law (With Special reference to Pornography, Abortion and Surrogacy)' (Jan 1992) 92(1) *Columbia Law Review* 1 at 46

<sup>198</sup> Cass R Sunstein 'Neutrality in Constitutional Law (With Special reference to Pornography, Abortion and Surrogacy)' (Jan 1992) 92(1) *Columbia Law Review* 1 at 46

<sup>199</sup> Cass R Sunstein 'Neutrality in Constitutional Law (With Special reference to Pornography, Abortion and Surrogacy)' (Jan 1992) 92(1) *Columbia Law Review* 1 at 47

Raymond expresses the concern that surrogacy will lead to a view of women's reproductive capacities as an appropriate subject for commodification. 'When a state makes a surrogacy contract enforceable, even with the best of caveats and regulations to limit abuse and gross inequalities, it still does not address the nature of surrogacy itself which casts women in the role of "alternative reproductive vehicles", "rented wombs", "human incubators" and mere receptacles for sperm. An ultimate tragedy of surrogacy is that women come to view themselves as mere reproductive containers. Further what kind of society wants its female children to be born into a world where there is a breeder class of women? ... Are these the kind of aspirations we want girl children to have?'<sup>200</sup>

It has been suggested that surrogacy contracts are inherently harmful to children, as they turn babies into commodities - objects to be bought on the open market to satisfy the desire to have children. However, Trebilcock argues that if one considers that what is really being bought is the opportunity to become a parent, then the fear of commodification recedes. He comments that 'although carrying a child to term may mark the beginning of becoming a parent, the real task of child rearing begins with the birth of the child. The care, love, and nurturing demanded by children involves substantial resources, many years of a parents' life, endless degrees of energy, patience, and understanding, and ongoing financial commitments. That money is required in the raising of children, whether it be to pay for day-care, education, health care, or other amenities of life, does not seem to have destroyed the love most parents feel for their

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<sup>200</sup> Janice G Raymond 'The International Traffic in Women: Women Used in Systems of Surrogacy and Reproduction'. In H Patricia Hynes (ed) *Reconstructing Babylon: Women and Technology* (1990) 162



children, and it is difficult to believe that allowing commercial surrogacy contracts is antithetical to this love'.<sup>201</sup>

It has been argued that surrogacy arrangements are unnatural, and 'threaten the nature of the family unit by introducing a third party into the process of procreation which should be confined to a loving relationship between two people'.<sup>202</sup> These statements ignore the fact that infertility places additional strain on a relationship. Society expects women (especially married women) to have children and the failure to do so can cause tremendous heartache.

Pretorius comments that it is extremely difficult in a heterogeneous society such as ours, to ascertain whether surrogacy arrangements offend the legal convictions of the community.<sup>203</sup> Of interest is the fact that in some African tribes, practices similar to surrogacy arrangements are acceptable in certain circumstances in order to ensure that the kraal head has male offspring.<sup>204</sup>

It is clear that there is no uniformity of opinion as to whether surrogacy offends public policy. However, as surrogacy arrangements address a legitimate need, it is submitted that the practice should be permitted in the case of genuine infertility, unless there are compelling reasons for denying the parties access to this process.<sup>205</sup>

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<sup>201</sup> M J Trebilcock *The Limits of Freedom of Contract* (1993) 52

<sup>202</sup> M L Lupton 'Surrogate Parenting: The Advantages and Disadvantages' (1986) *TRW* 148 at 152

<sup>203</sup> Diederika Pretorius *Surrogate Motherhood: A Worldwide View of the Issues* (1994) 82

<sup>204</sup> Diederika Pretorius *Surrogate Motherhood: A Worldwide View of the Issues* (1994) 84

<sup>205</sup> Diederika Pretorius *Surrogate Motherhood: A Worldwide View of the Issues* (1994) 84

#### 4.1.1. A Comparative Perspective

Many legal dispensations have refused to recognise surrogacy contracts, and impose criminal sanctions should the parties choose to go ahead with the arrangement. In Australia, for example, the state of Queensland has refused to recognise surrogacy arrangements. An investigation of surrogate parenting produced the *Surrogate Parenthood Act*,<sup>206</sup> which prohibits parties from entering into a surrogacy contract (whether formal or informal, for gain or not), and imposes stiff penalties on those who transgress.<sup>207</sup> Moreover, the Queensland *Status of Children Amendment Act* provides that a child,<sup>208</sup> conceived by means of artificial fertilisation, and born to a married woman will be regarded as the child of that couple (provided that her husband has consented to the procedure). A child born to an unmarried woman or to a woman whose husband has not consented to the procedure, and conceived by means of artificial reproduction will be regarded as the birth mother's child, a situation that is not provided for in terms of the Act.

The effect hereof is that should the parties choose to proceed with a surrogacy arrangement, in addition to the possibility of criminal charges, the parties are faced with the problem that their contract is not enforceable. As the law does not recognise

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<sup>206</sup> *Surrogate Parenthood Act* (65 of 1988)

<sup>207</sup> The Act was based on the Demack Report which was published in March 1984. This report found surrogacy arrangements to be contrary to public policy and to be in violation of existing adoption legislation. Consequently, the report recommended that a surrogate mother should not be bound by the agreement.

<sup>208</sup> *Status of Children Amendment Act* of 1988

the validity of the agreement, the commissioning couple have no claim to the child as it is the legal child of the surrogate mother. Conversely, as the surrogate mother is unable to hold the commissioning couple to the contract, she takes the risk that the commissioning couple will change their minds, leaving her to take care of the child.

Another Australian state that prohibits surrogacy is South Australia. The *Family Relationship Amendment Act* prohibits all surrogacy and procurement contracts (contracts where a third party undertakes to arrange a surrogacy contract or introduce the prospective parties),<sup>209</sup> which contracts are illegal and, therefore, void.<sup>210</sup>

In Canada, a number of reports have addressed the topic of surrogacy, but their recommendations have yet to gain acceptance from the respective provincial legislatures. It appears that existing Canadian law would hold surrogacy contracts void for reasons of public policy.<sup>211</sup> Furthermore, surrogacy contracts are likely to be contrary to the principles of Canadian family law, which regards any undertaking to hand over a child at birth as illegal.<sup>212</sup> Parental responsibilities and rights are inalienable and incapable of transfer by way of contract.<sup>213</sup> As in South Africa,

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<sup>209</sup> *Family Relationship Amendment Act* (2 of 1988)

<sup>210</sup> Sections 10 g(1) &(2), *Family Relationship Amendment Act* (2 of 1988)

<sup>211</sup> Law Reform Commission of Canada *Medically Assisted Reproduction* (Working Paper 65: 1992) 65-66

<sup>212</sup> Law Reform Commission of Canada *Medically Assisted Reproduction* (Working Paper 65: 1992) 66

<sup>213</sup> Law Reform Commission of Canada *Medically Assisted Reproduction* (Working Paper 65: 1992) 66

parentage and custody issues are determined according to the best interests of the child.<sup>214</sup>

The Law Reform Commission of Canada recommends that surrogacy contracts be regarded as null and void.<sup>215</sup> <sup>216</sup> It submits that surrogacy arrangements fall within the sphere of family law. Thus, a Court asked to adjudicate the issue should do so within the framework of existing family law principles, without applying the law of contract.<sup>217</sup>

The Ontario Law Commission published its recommendations in 1985.<sup>218</sup> In contrast to other jurisdictions the Commission's proposals were extremely facilitative of surrogacy. The Commission recommends that surrogacy arrangements are enforceable, and that the practice be regulated by means of legislation. The surrogacy contract must comply with legislative provisions and must be submitted for approval by the relevant Court. In addition, the parties' suitability to participate in a surrogacy arrangement must be established before the Court can approve the contract.<sup>219</sup> The Commission states that

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<sup>214</sup> Law Reform Commission of Canada *Medically Assisted Reproduction* (Working Paper 65: 1992) 66

<sup>215</sup> The Commission began its investigation into medically assisted procreation in 1988 and finally submitted its recommendations in 1992. Law Reform Commission of Canada *Medically Assisted Reproduction* (Working Paper 65: 1992)

<sup>216</sup> Law Reform Commission of Canada *Medically Assisted Reproduction* (Working Paper 65: 1992) 65-66

<sup>217</sup> Law Reform Commission of Canada *Medically Assisted Reproduction* (Working Paper 65: 1992) 65-66

<sup>218</sup> Ontario Law Reform Commission *Report on Human Artificial Reproduction and Related Matters* (1985)

<sup>219</sup> See Bernard Dickens 'Canada: The Ontario Law Reform Commission Project on Human Artificial Reproduction'. In Sheila Mclean (ed) *Law Reform and Human Reproduction* (1992)

their 'sole purpose in allowing individuals to pursue surrogate motherhood arrangements under strict control is to respond to infertility, not to afford individuals the opportunity to satisfy their lifestyle preferences'.<sup>220</sup>

In the United Kingdom, the relevant legislation does not explicitly address the status of surrogacy contracts, but it would appear that such contracts are unenforceable.<sup>221</sup> The *Human Fertilisation and Embryology Act* settles the question of parentage in favour of the birth mother.<sup>222</sup> Thus, the surrogate mother will be deemed to be the child's legal mother, whether pregnancy resulted from sexual intercourse, artificial insemination without licensed assistance or licensed assisted conception.<sup>223</sup> If the surrogate mother is married and her husband has consented to the procedure, he will be presumed to be the legal father of the child concerned.<sup>224</sup>

However, section 30 of the aforementioned Act permits a Court on application to make a parental order transferring parentage to the commissioning couple.<sup>225</sup> If the application is successful, the parental responsibilities of the surrogate mother and, where applicable, her husband, are terminated. The Court must be satisfied that the

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<sup>220</sup> The South African Law Commission discusses the recommendations of the Ontario Law Reform Commission. South African Law Commission *Report on Surrogate Motherhood* (Project 65: 1993) 51

<sup>221</sup> *Surrogacy Arrangements Act* (1985) and the *Human Fertilisation and Embryology Act* (1990)

<sup>222</sup> Section 27(1), *Human Fertilisation and Embryology Act* (1990) provides that 'the woman who is carrying or has carried a child as a result of the placing in her of an embryo or of sperm and eggs, and no other woman, is to be treated as the mother of the child'

<sup>223</sup> Jo Bridgeman and Susan Millns *Feminist Perspectives on Law. Law's Engagement with the Female Body* (1998) 156

<sup>224</sup> Section 28, *Human Fertilisation and Embryology Act* (1990)

<sup>225</sup> Section 30, *Human Fertilisation and Embryology Act* (1990), came into effect on 1 November 1994

surrogate and, if she is married, her husband 'have freely and with full understanding of what is involved, agreed unconditionally to the making of the order'.<sup>226</sup> However, the consent of the surrogate mother is ineffective if given within six weeks of the child's birth.<sup>227</sup> Should the surrogate be unwilling to surrender the child, the commissioning parents will not succeed with their application. Much weight is attached to the role that the surrogate mother plays in carrying and giving birth to the child, and, consequently, she will not be forced to honour a prior undertaking to surrender the child. This may have harsh consequences, especially in the case of full surrogacy, where the commissioning parents are genetically related to the child.

A section 30 application is restricted to married couples making use of assisted reproduction technologies, and at least one of the intended parents must be genetically related to the child. The order must be sought within six months of the child's birth and the child must reside with the commissioning parents. Furthermore, the Court must be satisfied that no payments were made to the surrogate, except for reasonable expenses or payments authorised by the Court.<sup>228</sup> The order is subject to provisions of the *Adoption Act* which makes the child's welfare the Court's paramount consideration.<sup>229</sup>

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<sup>226</sup> Section 30(5), *Human Fertilisation and Embryology Act* (1990)

<sup>227</sup> Section 30(6), *Human Fertilisation and Embryology Act* (1990)

<sup>228</sup> Section 30(7), *Human Fertilisation and Embryology Act* (1990)

<sup>229</sup> Section 6 of the *Adoption Act* (1976), provides that '[i]n reaching any decision relating to an application for a parental order a court shall have regard to all the circumstances, first consideration being given to the need to safeguard and promote the welfare of the child throughout his childhood; and shall so far as practicable ascertain the wishes and feelings of the child regarding the decision and give due consideration to them, having regard to his age and understanding'

Where the commissioning parents are unable to bring an application in terms of section 30, they can apply to adopt the child, or have it made a ward of Court.<sup>230</sup> The Court would then resolve the matter by ascertaining the best interests of the child.<sup>231</sup> However, application of the best interests test differs from case to case. The Courts tend to take certain factors into account including, maternity, the material circumstances of the respective parties, and whether the surrogate mother wants to keep the child. In both *Re P (Minors) (Wardship: Surrogacy)*,<sup>232</sup> and *A v C*,<sup>233</sup> the surrogate mother was unwilling to relinquish the child. In determining the best interests of the child, the Court emphasised the existing maternal bond between the surrogate mother and the child.

#### 4.1.2. The South African Law Commission's Recommendations

As discussed, surrogacy is not expressly prohibited by South African law. The *Human Tissue Act* allows for the use of donor gametes for the purpose of artificial insemination.<sup>234</sup> This Act, while not intended to cover surrogacy arrangements, does not explicitly exclude them from its ambit. Nevertheless, in the absence of legislation

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<sup>230</sup> Jo Bridgeman and Susan Millns *Feminist Perspectives on Law. Law's Engagement with the Female Body* (1998) 158

<sup>231</sup> In *Re C* [1985] F L R 846, Latey J discusses the criteria that the court will take into account to establish the best interests of the child. It is first of all important to establish that the commissioning couple still wanted the child and that the surrogate mother did not. Following that, the court should consider the commissioner's ages, their marital status and the state of their relationship, and their employment and residential circumstances. These factors would enable the court to assess their ability to provide for the child's material and emotional well-being compared with any other source. Derek Morgan 'Who to Be or Not to Be: The Surrogacy Story' (May 1986) 49 *Modern Law Review* 358 at 365

<sup>232</sup> *Re P (Minors) (Surrogacy: Wardship)* [1987] 2 F.L.R. 421

<sup>233</sup> *A v C* [1985] F.L.R. 453

<sup>234</sup> *Human Tissue Act* 65 of 1983

to the contrary, it is questionable whether a surrogacy contract is valid and, hence, enforceable. If the surrogate mother refuses to hand over the child at birth, it is unlikely that the Courts would compel her to do so. In terms of existing law, she is the legal mother of the child and any agreement to terminate her parental responsibilities prior to birth would be *contra bonos mores*. The common law presumptions that establish parenthood favour the surrogate mother and her spouse. Furthermore, where a child is conceived by artificial means, the *Children's Status Act* provides that the child is the legitimate child of the couple to whom it is born, provided both spouses have consented to the procedure.<sup>235</sup> The effect of this section is to determine parenthood in favour of the birth mother (the surrogate mother). The commissioning parents have no legally enforceable right to the child, even where they are the genetic parents.

The South African Law Commission proposes legislation that would require compliance with certain standard practices, the enforcement of which are placed in the hands of the judiciary. In terms of the proposed legislation, the Court may only approve those pre-conception agreements that comply with certain criteria, and only these arrangements are to have legal effect.<sup>236</sup> Confirmation by the Court of the surrogacy

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<sup>235</sup> The Children's Status Act provides that 'no right, duty, obligation shall arise as a result of the artificial insemination of a woman and any person whose gamete or gametes have been used for such insemination and the blood relations of that person except where - (a) that person is the woman who gave birth to that child; or (b) that person is the husband of such a woman at the time of such artificial insemination'. Section 5(2), *Children's Status Act* 82 of 1987

<sup>236</sup> The Commission proposes that no surrogate motherhood agreement shall be valid unless 'the agreement is confirmed in writing by a court within whose area of jurisdiction the surrogate mother is domiciled or habitually residing'. Clause 2(d), Schedule A to the South African Law Commission *Report on Surrogate Motherhood* (Project 65: 1993)

The Commission proposes further that 'any surrogate motherhood agreement that does not comply with the provisions of this Act shall be invalid and any child born as a result of any action taken in execution of such an arrangement shall, subject to the provisions of section 5 of the *Status of Children Act*, 1987 (Act 82 of 1987), for all purposes be deemed to be the child of the woman that gave birth to that child'.



agreement ensures that at birth the commissioning parents become the child's legal parents, and where necessary, the surrogate mother can be compelled to surrender the child. Once the agreement has been approved by the Court, the draft bill provides for full contractual enforcement.

The Parliamentary Ad Hoc Select Committee shares the South African Law Commission's view that it should be compulsory for the parties to enter into a written surrogacy arrangement.<sup>237</sup> This agreement will have legal effect only once the Court has approved the contract. Thus, '[o]nce the Court has confirmed the agreement, it should be a valid and enforceable document. In this way the parties are legally bound by the agreement and the interests of the child [are] protected'.<sup>238</sup>

Therefore, as long as the agreement has been confirmed by the Court, it is valid and enforceable. Where the arrangement does not comply with the prescribed criteria and the Court does not approve the contract, the surrogate mother (and where applicable) her husband are regarded as the child's legal parents. If the surrogate mother and her husband are willing to continue with the arrangement, the commissioning parents may apply to adopt the child. However, should either of the parties breach the agreement, the innocent party has no remedy as the agreement is void and unenforceable.

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Clause 8(2), Schedule A to the South African Law Commission *Report on Surrogate Motherhood* (Project 65: 1993)

<sup>237</sup> para 6.7.1, Parliamentary Ad Hoc Select Committee on the Report of the South African Law Commission on Surrogate Motherhood *Draft Final Report* dated October 1998 at 40

<sup>238</sup> para 6.7.2, Parliamentary Ad Hoc Select Committee on the Report of the South African Law Commission on Surrogate Motherhood *Draft Final Report* dated October 1998 at 42

## 4.2. The Surrogate Motherhood Agreement

### 4.2.1. Confirmation of the Agreement by Court

As mentioned, the South African Law Commission proposes that certain criteria are met before a surrogacy contract will be ratified by the Court. The Commission requires that:

- 1) The agreement be in writing and signed by all the parties;<sup>239</sup>
- 2) the agreement is entered into in South Africa;<sup>240</sup>
- 3) the parties are domiciled in South Africa at the time of entering into the agreement;<sup>241</sup>
- 4) the parties must apply to Court for confirmation of the written agreement before impregnation can take place;<sup>242</sup>
- 5) the commissioning mother must be permanently and irreversibly infertile;<sup>243</sup> and
- 6) the parties must be competent and suitable persons, and fully appreciate the nature and legal consequences of their actions.<sup>244</sup>

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<sup>239</sup> Clause 2(a), Schedule A to the South African Law Commission *Report on Surrogate Motherhood* (Project 65: 1993)

<sup>240</sup> Clause 2(b), Schedule A to the South African Law Commission *Report on Surrogate Motherhood* (Project 65: 1993)

<sup>241</sup> Clause 2(c), Schedule A to the South African Law Commission *Report on Surrogate Motherhood* (Project 65: 1993)

<sup>242</sup> Clause 2(d), Schedule A to the South African Law Commission *Report on Surrogate Motherhood* (Project 65: 1993)

<sup>243</sup> Clause 6(1)(b)(i) & (ii), Schedule A to the South African Law Commission *Report on Surrogate Motherhood* (Project 65: 1993)

The High Court in whose jurisdiction the surrogate mother is domiciled or habitually resides, is charged with examining and confirming the surrogacy agreement.<sup>245</sup> The parties are required to place conclusive evidence of the following before the Court:

- 1) The commissioning wife's inability to give birth to a living child, which incapacity is permanent and irreversible;<sup>246</sup>
- 2) the physical and psychological suitability of the surrogate mother to act as such;<sup>247</sup>
- 3) the psychological suitability of the commissioning parents to be parents;<sup>248</sup>
- 4) the family circumstances of the commissioning parents;<sup>249</sup> and
- 5) the interests of the commissioning parents' descendants or adopted child or children.<sup>250</sup>

It is arguable whether the judiciary is the only appropriate forum to evaluate these agreements. For example, in Israel, a surrogacy contract is assessed by a committee

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<sup>244</sup> Clause 6(1)(b)(iii), Schedule A to the South African Law Commission *Report on Surrogate Motherhood* (Project 65: 1993)

<sup>245</sup> Clause 2(d), Schedule A to the South African Law Commission *Report on Surrogate Motherhood* (Project 65: 1993)

<sup>246</sup> Clause 6 (2)(a), Schedule A to the South African Law Commission *Report on Surrogate Motherhood* (Project 65: 1993)

<sup>247</sup> Clause 6 (2)(b), Schedule A to the South African Law Commission *Report on Surrogate Motherhood* (Project 65: 1993)

<sup>248</sup> Clause 6 (2)(c), Schedule A to the South African Law Commission *Report on Surrogate Motherhood* (Project 65: 1993)

<sup>249</sup> Clause 6 (2)(d), Schedule A to the South African Law Commission *Report on Surrogate Motherhood* (Project 65: 1993)

<sup>250</sup> Clause 6 (2)(e), Schedule A to the South African Law Commission *Report on Surrogate Motherhood* (Project 65: 1993)

comprising seven members - two gynaecologists, a doctor expert in internal medicine, a clinical psychologist, a social worker, a lawyer and a minister of the religion of the parties. There must be at least three members of each gender.<sup>251</sup> The advantage of such a system is that the arrangement is assessed by a number of persons, and in making its decision is able to draw upon the combined expertise of its members.

In the United Kingdom, provision is made for the appointment of a guardian *ad litem* to assist the Court where an application is brought for a parental order in terms of section 30.<sup>252 253</sup> The guardian *ad litem* is appointed on submission of the application, which is brought after the child's birth. The guardian *ad litem* is required to submit a report to the relevant Court after conducting enquiries as to whether or not the requirements of section 30 have been satisfied. The guardian *ad litem* is also required to ascertain whether the approval of a parental order is in the child's best interest. Section 6 of the *Adoption Act* provides that 'in reaching any decision relating to the application for a Parental Order, a Court shall have regard to all the circumstances, first consideration being given to the need to safeguard and promote the welfare of the child throughout

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<sup>251</sup> Rhona Schuz 'The Right to Parenthood: Surrogacy and Frozen Embryos' (1996) *International Survey of Family Law* 241

<sup>252</sup> *Family Proceedings Courts (Children Act 1989) (Amendment) Rules 1994* S. I. 1994 No. 2166

<sup>253</sup> Rule 4A.5, *The Family Proceedings (Amendment)(No 2) Rules 1994* S. I. 2165 provide that (1) As soon as practicable after the application has been filed the court shall consider the appointment of a guardian *ad litem* in accordance with section 41(1) of the *Children Act 1989*. (2) In the High Court the Official Solicitor shall, if he consents, be appointed as the guardian *ad litem* of the child. (3) In a county court and in the High Court where the Official Solicitor does not consent to act as guardian *ad litem*, the guardian *ad litem* shall be appointed from a panel established under the Guardian *Ad litem* and Reporting Officers (Panels) Regulations 1991. (4) In addition to such matters set out in rule 4.11 as are appropriate to the proceedings, the guardian *ad litem* shall - (i) investigate the matters set out in section 30(1) to (7) of the 1990 Act; (ii) so far as he considers necessary investigate any matter contained in the application form or other matter which appears relevant to the making of a parental order; (ii) advise the court on whether there is any reason under section 6 of the *Adoption Act 1976* (a), as applied with modifications by the *Parental Orders (Human Fertilisation and Embryology) Regulations 1994* to refuse the parental order

his childhood'.<sup>254</sup> Thus, the role of the guardian *ad litem* is an active one, requiring him to interview the applicants and to investigate the accuracy of the information with which he is provided.

The Ontario Law Commission recommends that Children's Aid Societies (quasi-public agencies mandated to protect the interests of children) assist the Court in assessing the surrogacy arrangement.<sup>255</sup> Where application is made for the confirmation of a surrogacy agreement, the relevant Children's Aid Society is notified and has *locus standi* to intervene should its records show that any of the parties are unsuitable to participate in the arrangement.<sup>256</sup>

The South African Law Commission does not provide for expert assistance to the Court but it is implicit in its requirements that expert evidence or reports will have to be furnished. It is submitted that in this regard the Office of the Family Advocate could be of assistance to the Court, as (in theory) it has the resources to implement an enquiry. However, the Office of the Family Advocate is already hard pressed to cope with the demands placed on it, and it is possible that it may not be equipped to provide the Court with information of sufficient particularity for a decision to be made whether or not to confirm the agreement. Nevertheless, it is clear that the Court would be greatly assisted if an independent person or body were appointed to investigate the accuracy of the information placed before it.

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<sup>254</sup> Section 6, *Adoption Act* 1976, as applied with modifications by the *Parental Orders (Human Fertilisation and Embryology) Regulations* 1994

<sup>255</sup> Bernard Dickens 'Canada: The Ontario Law Reform Commission Project on Human Artificial Reproduction'. In Sheila Mclean (ed) *Law Reform and Human Reproduction* (1992) 48

<sup>256</sup> Diederika Pretorius *Surrogate Motherhood: A Worldwide View of the Issues* (1994) 37

It should be noted that it is extremely expensive to bring an application in the High Court. This will prevent poorer persons from making use of surrogacy. In the United Kingdom, legislation has been drafted which will bring parental orders within the ambit of those proceedings for which Legal Aid is available.<sup>257</sup> In South Africa, applicants for Legal Aid must first pass a means test, and, thereafter, the merits of the matter are assessed. Thus Legal Aid may provide a solution for financially disadvantaged applicants.

The Parliamentary Ad Hoc Select Committee concurs with the South African Law Commission that it should be compulsory for the parties to conclude a written surrogacy agreement.<sup>258</sup> The Committee argues that it is 'important to establish the intention of the parties as to parental rights and their willingness to proceed with this intention'.<sup>259</sup> The contract should be confirmed by a Court before the parties can go ahead with the arrangement. Before confirming the agreement, the Court must be satisfied that the commissioning parents and surrogate mother have complied with the substantive requirements provided for in the proposed legislation. These requirements are in many instances similar to those of the South African Law Commission.

The Committee recommends that:

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<sup>257</sup> Legal Aid (Scope) Regulation 1994

<sup>258</sup> para 6.7.1, Parliamentary Ad Hoc Select Committee on the Report of the South African Law Commission on Surrogate Motherhood *Draft Final Report* dated October 1998 at 40

<sup>259</sup> para 6.7.1, Parliamentary Ad Hoc Select Committee on the Report of the South African Law Commission on Surrogate Motherhood *Draft Final Report* dated October 1998 at 40

- 1) The parties to the surrogacy contract are South African citizens, and domiciled in South Africa at the time of conclusion of the contract;<sup>260</sup>
- 2) the parties are suitable persons;<sup>261</sup> and
- 3) are parties are competent to enter into a surrogacy agreement.<sup>262</sup>

However, the Committee differs from the Commission in that it recommends that a woman be permitted to act as a surrogate mother, regardless of her marital status or sexual orientation,<sup>263</sup> provided she is suitable,<sup>264</sup> competent,<sup>265</sup> financially secure,<sup>266</sup> and has a child or children of her own. <sup>267</sup> (The Commission proposes that the surrogate mother be either a married, widowed or divorced woman, who has already given birth to at least one child).<sup>268</sup>

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<sup>260</sup> para 6.4.1.5 & 6.4.2.6, Parliamentary Ad Hoc Select Committee on the Report of the South African Law Commission on Surrogate Motherhood *Draft Final Report* dated October 1998 at 35 and at 37

<sup>261</sup> para 6.4.1.1 & 6.4.2.3, Parliamentary Ad Hoc Select Committee on the Report of the South African Law Commission on Surrogate Motherhood *Draft Final Report* dated October 1998 at 35 and at 36

<sup>262</sup> para 6.4.1.2. & 6.4.2.3, Parliamentary Ad Hoc Select Committee on the Report of the South African Law Commission on Surrogate Motherhood *Draft Final Report* dated October 1998 at 35 and at 36

<sup>263</sup> para 6.4.1.3, Parliamentary Ad Hoc Select Committee on the Report of the South African Law Commission on Surrogate Motherhood *Draft Final Report* dated October 1998 at 35

<sup>264</sup> para 6.4.1.1, Parliamentary Ad Hoc Select Committee on the Report of the South African Law Commission on Surrogate Motherhood *Draft Final Report* dated October 1998 at 35

<sup>265</sup> para 6.4.1.2, Parliamentary Ad Hoc Select Committee on the Report of the South African Law Commission on Surrogate Motherhood *Draft Final Report* dated October 1998 at 35

<sup>266</sup> para 6.4.1.6, Parliamentary Ad Hoc Select Committee on the Report of the South African Law Commission on Surrogate Motherhood *Draft Final Report* dated October 1998 at 35

<sup>267</sup> para 6.4.1.4, Parliamentary Ad Hoc Select Committee on the Report of the South African Law Commission on Surrogate Motherhood *Draft Final Report* dated October 1998 at 35

<sup>268</sup> The Commission proposes that '[n]o surrogate motherhood agreement shall be valid unless the woman who is to become the surrogate mother has already given birth to in a natural way to at least one child and is at the time of the entering into the agreement a married woman, divorced or a widow'. Clause

The Committee recommends that 'surrogacy should be available to any competent person or persons irrespective of their marital status or sexual orientation',<sup>269</sup> whereas the Commission requires that the commissioning parents are a legally married couple.<sup>270</sup>

The Committee does not stipulate which Court has jurisdiction to hear the matter. In contrast to the Commission, it would appear that the Committee envisages the lower Courts having jurisdiction to hear these applications.

The Committee also proposes that the surrogacy contract is standardised. The parties are not prevented from including optional clauses, but these should not conflict with public policy.<sup>271</sup> The Committee lists the required contents of the contract as follows:

- 1) the agreement should clearly identify whether the arrangement involves full or partial surrogacy;<sup>272</sup>
- 2) there should be an averment that the parties understand and agree to the terms of the

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3, Schedule A to the South African Law Commission *Report on Surrogate Motherhood* (Project 65: 1993)

<sup>269</sup> para 6.4.2.4, Parliamentary Ad Hoc Select Committee on the Report of the South African Law Commission on Surrogate Motherhood *Draft Final Report* dated October 1998 at 36

<sup>270</sup> 'No person except a husband and wife who are lawfully married to each other and who act jointly as a couple shall be competent to conclude a valid surrogate motherhood agreement'. Clause 4, Schedule A to the South African Law Commission *Report on Surrogate Motherhood* (Project 65: 1993)

<sup>271</sup> Parliamentary Ad Hoc Select Committee on the Report of the South African Law Commission on Surrogate Motherhood *Draft Final Report* dated October 1998 at 41

<sup>272</sup> para 6.7.4.1, Parliamentary Ad Hoc Select Committee on the Report of the South African Law Commission on Surrogate Motherhood *Draft Final Report* dated October 1998 at 41



contract and the legal position pertaining to their particular surrogacy agreement;<sup>273</sup>

3) the financial responsibilities of the parties should be established;<sup>274</sup>

4) the commissioning parents must state that they accept responsibility for the child even where it is born physically or mentally handicapped;<sup>275</sup>

5) the health and insurance policies that are to be maintained throughout the agreement;<sup>276</sup>

6) the parties should make provision for those circumstances in which abortion may occur.

In particular, should the surrogate mother decide to have a non-therapeutic abortion, she may be held responsible for the necessary expenses of the commissioning parents in respect of her pregnancy;<sup>277</sup>

7) the agreement should make provision for any rights ( for example, rights of access) that the surrogate mother might have with regard to the child;<sup>278</sup>

8) the agreement should make provision for the custody of the child in the event of the death or divorce of one or both commissioning parents;<sup>279</sup>

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<sup>273</sup> para 6.7.4.2, Parliamentary Ad Hoc Select Committee on the Report of the South African Law Commission on Surrogate Motherhood *Draft Final Report* dated October 1998 at 41

<sup>274</sup> para 6.7.4.4, Parliamentary Ad Hoc Select Committee on the Report of the South African Law Commission on Surrogate Motherhood *Draft Final Report* dated October 1998 at 41

<sup>275</sup> para 6.7.4.5, Parliamentary Ad Hoc Select Committee on the Report of the South African Law Commission on Surrogate Motherhood *Draft Final Report* dated October 1998 at 41

<sup>276</sup> para 6.7.4.6, Parliamentary Ad Hoc Select Committee on the Report of the South African Law Commission on Surrogate Motherhood *Draft Final Report* dated October 1998 at 41

<sup>277</sup> para 6.7.4.7, Parliamentary Ad Hoc Select Committee on the Report of the South African Law Commission on Surrogate Motherhood *Draft Final Report* dated October 1998 at 41

<sup>278</sup> para 6.7.4.8, Parliamentary Ad Hoc Select Committee on the Report of the South African Law Commission on Surrogate Motherhood *Draft Final Report* dated October 1998 at 41

<sup>279</sup> para 6.7.4.8, Parliamentary Ad Hoc Select Committee on the Report of the South African Law Commission on Surrogate Motherhood *Draft Final Report* dated October 1998 at 41

9) the parties must agree as to whether the arrangement can be publicised;<sup>280</sup>

10) the agreement should provide for testing for social diseases.<sup>281</sup>

In contrast, the Commission does not provide for a standardised contract. It simply requires that the agreement make provision for the 'custody, care, upbringing and general welfare of the child that is to be born in the event of the death of the commissioning parents or one of them, or their divorce before the birth of the child',<sup>282</sup> and its recommendations focus largely on the evidence to be placed before the Court in order to enable the Court to decide whether or not to confirm the agreement.

The aforementioned requirements are only relevant once the parties are deemed competent and suitable persons. These notions are ill defined but nonetheless, both the Commission and the Committee seek to disqualify persons on these grounds.

#### **4.2.2. Access to Surrogacy Arrangements**

The Commission has adopted a somewhat conservative stance with regard to those persons who are permitted recourse to surrogacy arrangements. Eligibility requirements play a 'gate keeping' role in excluding certain persons from surrogacy arrangements.<sup>283</sup>

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<sup>280</sup> para 6.7.4.9, Parliamentary Ad Hoc Select Committee on the Report of the South African Law Commission on Surrogate Motherhood *Draft Final Report* dated October 1998 at 41

<sup>281</sup> para 6.7.4.10, Parliamentary Ad Hoc Select Committee on the Report of the South African Law Commission on Surrogate Motherhood *Draft Final Report* dated October 1998 at 41

<sup>282</sup> Clause 6(1)(f), Schedule A to the South African Law Commission *Report on Surrogate Motherhood* (Project 65: 1993)

<sup>283</sup> Belinda Bennett 'Gamete Donation, Reproductive Technology and the Law'. In K Peterson (ed) (1993) 11(2) *Law and Medicine. A Special Issue of the Law in Context* 41 at 50

While this may have the desirable effect of screening out unsuitable candidates, defining suitability is problematic and may be discriminatory.

#### **4.2.2.1. The Commissioning Couple**

As mentioned above, the Commission proposes that surrogacy arrangements are only available to married couples, acting jointly as such,<sup>284</sup> where the commissioning wife is incapable of giving birth to a living child. This condition must be permanent and irreversible.<sup>285</sup> The Commission recommends that in order to enable the Court to give proper consideration to the application, conclusive proof of infertility must be provided.<sup>286</sup> It is submitted that these provisions are unsatisfactory as they deny access to surrogacy to unmarried persons, and to couples where the commissioning father is also infertile.

Presently, only civil marriages are recognised as legally valid marriages in terms of South African law. However, this is likely to change in the near future.<sup>287</sup> Consequently, marriages concluded according to Customary law, Muslim or Hindu rites are not recognised as legally valid marriages. The failure to recognise these marriages is subject to constitutional challenge because this amounts to unfair

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<sup>284</sup> Clause 4, Schedule A to the South African Law Commission *Report on Surrogate Motherhood* (Project 65: 1993)

<sup>285</sup> Clause 6(1)(a), Schedule A to the South African Law Commission *Report on Surrogate Motherhood* (Project 65: 1993)

<sup>286</sup> Clause 6(2)(a), Schedule A to the South African Law Commission *Report on Surrogate Motherhood* (Project 65: 1993)

<sup>287</sup> See South African Law Commission *Discussion Paper on Customary Marriages* (Discussion Paper 74, Project 90 *The Harmonisation of the Common Law and the Indigenous Law*, August 1997)

discrimination on grounds of religion or culture.<sup>288</sup> Furthermore, in the context of same-sex marriages, there has been some suggestion that lack of legal recognition amounts to unfair discrimination on the grounds of sexual orientation.<sup>289</sup>

A recent amendment to the regulations to the *Human Tissue Act* now defines 'married' as including 'a marriage by way of contract which, in terms of any Act or by customary law, constitutes a marriage',<sup>290</sup> and allows unmarried persons access to artificial fertilisation.<sup>291</sup> Thus, persons other than legally married couples are now have access to artificial fertilisation. In this respect the Commission's proposals now contradict existing legislation.

A reason for denying unmarried persons access to reproductive technologies is that it is in the child's best interest to be born to a stable two parent family.<sup>292</sup> Certainly, the fear that children, who are born to unmarried persons, will be psychologically scarred and socially stigmatised is legitimate. However in this age of single-parent families and the

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<sup>288</sup> Section 8, *Constitution of the Republic of South Africa Act* 108 of 1996

<sup>289</sup> Section 8, *Constitution of the Republic of South Africa Act* 108 of 1996

<sup>290</sup> Regulation 1 of the Regulations in terms of section 37 of the Human Tissue Act, as amended by Government Notice R1354 in Government Gazette 18362 of 17 October 1997

<sup>291</sup> Regulation 8(1) deleted by Government Notice R1354 in Government Gazette 18362 of 17 October 1997

<sup>292</sup> Bridgeman and Millns quote from the Report of the Committee of Inquiry into Human Fertilisation and Embryology Cmnd 9314 (1984) at para 2.5, which states that 'to judge from the evidence many believe the interests of the child dictate that it should be born into a home where there is a loving, stable, heterosexual relationship and that, therefore, the deliberate creation of a child for a woman who is not a partner in such a relationship is morally wrong ... We believe that as a general rule it is better for children to be born into a two-parent family, with both father and mother, although we recognise that it is impossible to predict with any certainty how lasting such a relationship will be'. Jo Bridgeman and Susan Millns *Feminist Perspectives on Law. Law's Engagement with the Female Body* (1998) 137

social reality of illegitimacy,<sup>293</sup> unless there is proof that being raised in a single parent family is likely to be detrimental to the welfare of the child, it would seem unfair to deny access to surrogacy arrangements to unmarried persons for this reason alone.<sup>294</sup>

In the United States, the Supreme Court has yet to consider whether the right to procreate encompasses a right to utilise reproductive technologies.<sup>295</sup> Its decisions have been confined to the issues of involuntary state ordered sterilisation,<sup>296</sup> contraception,<sup>297</sup> and abortion.<sup>298</sup> However, these cases establish that, regardless of marital status, the right to privacy protects the individual from any unwarranted interference by the state with his or her procreative rights.

In *Skinner v Oklahoma* the Court commented on the importance of procreative liberty in marriage. This right 'involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race ... [The

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<sup>293</sup> In South Africa, the failure to recognise those unions which are recognised by customary law or religious laws but do not comply with the *Marriage Act* 25 of 1961, has resulted in a situation where a large segment of our population is in fact illegitimate.

<sup>294</sup> Anon 'Reproductive Technology and the Reproductive Rights of the Unmarried' (1986) 98 *Harvard Law Review* 669 at 681

<sup>295</sup> Robertson argues that full procreative freedom includes both the freedom not to reproduce as well as the freedom to reproduce when, with whom, and by what means one chooses. John Robertson 'Procreative Liberty and the Control of Conception, Pregnancy and Childbirth' (1983) 69(3) *Virginia Law Review* 405 at 406

<sup>296</sup> In the earlier half of this century the United States Supreme Court considered two cases on the legality of state ordered sterilisation. Although, in *Buck v Bell* (274 U.S. 22(1927)), the Court found that sterilisation of mentally retarded persons without their consent violated neither the due process nor equal protection clause of the American Bill of Rights, this decision is now largely regarded as being incorrect. In *Skinner v Oklahoma* (316 U.S. 535 (1942)), the Court found that a criminal statute that ordered the sterilisation of criminals who had repeated felony convictions but which exempted 'white collar' criminals fell foul of the equal process provision contained in the Bill of Rights

<sup>297</sup> *Eisenstadt v Baird* 405 U.S. 438 (1972)

<sup>298</sup> *Roe v Wade* 410 U.S. 113 (1973)

person sterilised by the State] is forever deprived of a basic liberty'.<sup>299</sup> In *Griswold v Connecticut*, the link between procreative liberty and marriage was made once more when the Supreme Court found that a ban on the use of contraceptives by the state of Connecticut violated marital privacy.<sup>300</sup> However, *Eisenstadt v Baird* extended this reasoning to unmarried persons.<sup>301</sup> The Court stated that 'if the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child'.<sup>302</sup> In *Roe v Wade*, the Court found that the right to terminate a pregnancy is available to all persons regardless of marital status.<sup>303 304</sup>

The above cases refer to procreative freedom in the context of state interference with the prevention of conception. However, it is arguable whether procreative liberty includes the right of unmarried persons to use surrogacy to become parents. Robertson argues that while married persons do have a right to use reproductive technologies to effect conception, it does not follow that single persons have the same right. This is because the right accorded to married persons is an extension of the rights of familial autonomy and natural conception - rights that are already recognised by the Court. However in the case of unmarried persons, the Courts have yet to decide whether

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<sup>299</sup> *Skinner v Oklahoma* 316 U.S. 535 (1942) at 541

<sup>300</sup> *Griswold v Connecticut* 381 U.S. 479 (1965)

<sup>301</sup> *Eisenstadt v Baird* 405 U.S. 438 (1972)

<sup>302</sup> *Eisenstadt v Baird* 405 U.S. 438 (1972) at 453

<sup>303</sup> *Roe v Wade* 410 U.S. 113 (1973)

<sup>304</sup> I would like to acknowledge my indebtedness for the information contained in the above paragraph to Anon 'Reproductive Technology and the Procreation Rights of the Unmarried' (1986) 98 *Harvard Law Review* 669 at 675-677

unmarried persons have the right to conceive through natural intercourse let alone *via* artificial reproductive technologies.<sup>305</sup>

In South Africa, the Constitution legislates against unfair discrimination, providing for the equal treatment of all persons.<sup>306</sup> This right is only subject to limitation if it can be shown that the limitation is both reasonable and justifiable.<sup>307</sup> Therefore, if married persons are permitted recourse to reproductive technologies, then unmarried persons should have the same rights unless it can be shown that the limitation of that right is reasonable and justifiable.

Although it is often assumed that children are better off in heterosexual two parent families, studies of the social and emotional development of children raised in fatherless families indicate that the difficulties experienced by these children appear to be caused by the poverty and isolation these families often experience, rather than the absence of a father figure *per se*.<sup>308</sup> It is submitted that as surrogacy involves a planned pregnancy, and is usually initiated by people of adequate means, a single commissioning parent should be given access to surrogacy. Commenting on unmarried women seeking access to infertility treatment in the United Kingdom,<sup>309</sup> Golombok and

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<sup>305</sup> John Robertson 'Procreative Liberty and the Control of Conception, Pregnancy and Childbirth' (1983) 69(3) *Virginia Law Review* 405 at 433

<sup>306</sup> Section 9, *Constitution of the Republic of South Africa Act* 108 of 1996

<sup>307</sup> Section 36, *Constitution of the Republic of South Africa Act* 108 of 1996

<sup>308</sup> Jo Bridgeman and Susan Millns *Feminist Perspectives on Law. Law's Engagement with the Female Body* (1998) 138

<sup>309</sup> In the United Kingdom, the *Human Fertilisation and Embryology Act* 1990 provides that the need for a father is a factor in assessing whether a woman should receive fertility treatment. The Human Fertilisation and Embryology Authority Code of Practice (1995) at para 3.19 provides that 'where the child will have no legal father, [c]entres are required to have regard to the prospective mother's ability to

Rust conclude that 'single women who have AID or IVF might generally be expected to be more motivated towards motherhood than those who have not needed or wanted to go to such extremes in order to give birth. Certainly, from this sign of commitment, ... we would not foresee special problems for children brought up in such families. The Warnock Report says nothing about the many children who are born into non-loving and unstable heterosexual relationships ... Given the extent to which children are abused within the traditional system, surely the double standards which have so far permeated the debate about eligibility for AID and IVF should be recognised',<sup>310</sup>

The Parliamentary Ad Hoc Select Committee recommends that any competent and suitable person or persons should have access to surrogacy arrangements, regardless of their marital status or sexual orientation.<sup>311</sup> Thus, unmarried men and women, homosexual or lesbian couples as well as married heterosexual couples are permitted to make use of surrogacy, provided that they comply with the Committee's other requirements.

Both the South African Law Commission and the Ad Hoc Parliamentary Select Committee require that at least one of the commissioning parents is genetically related to the child. This means that surrogacy is unavailable to a couple where both parties are

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meet the child's needs throughout his or her childhood. Where appropriate, centres should consider particularly whether there is anyone else within the prospective mother's family or social circle willing and able to share the responsibility for meeting those needs, and for bringing up, maintaining, and caring for the child'

<sup>310</sup> Jo Bridgeman and Susan Millns *Feminist Perspectives on Law. Law's Engagement with the Female Body* (1998) 139

<sup>311</sup> para 6.4.2.4, Parliamentary Ad Hoc Select Committee on the Report of the South African Law Commission on Surrogate Motherhood *Draft Final Report* dated October 1998 at 36



unable to provide gametes, and the commissioning wife is unable to carry a child to term. Certainly, it is unusual for a situation such as this to arise, but it is by no means impossible. The reason for allowing infertile persons access to surrogacy, is that surrogacy is probably their last resort. Consequently, by denying access to a couple where both parties are infertile one excludes the very persons who appear to be in greatest need of assistance from reproductive technologies.

#### **4.2.2.2. The Surrogate Mother**

Clearly, a potential surrogate mother must be able to cope with the considerable physical and psychological demands of surrogacy. Determining a potential surrogate mother's suitability is no easy task. Charo discusses the profile of surrogate mothers in the United States, and concludes that generally surrogate mothers are less educated and less financially secure than those persons who hire them.<sup>312</sup> This means that surrogate mothers are likely to be more needy and have access to fewer resources than the commissioning parents, which makes them potential victims of exploitative practices. As discussed elsewhere, this inequality of bargaining power is a reason for the general reluctance to allow commercial surrogacy. On the other hand, by allowing any competent woman to act as a surrogate mother, women are afforded an opportunity to earn money while working at home. 'Childless couples, ... have a real human need, and they are willing to put up their own money to pay for it. On the other side are

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<sup>312</sup> R Alto Charo 'United States: Surrogacy'. In Sheila A M Mclean *Law Reform and Human Reproduction* (1992) 223 at 226

consenting surrogate mothers who would like the income, and who feel that the money amply compensates them for their labour'.<sup>313</sup>

The South African Law Commission proposes that only those women, who have previously given birth in a 'natural way' to at least one child, and who at the time of the agreement are either married, widowed or divorced, should be regarded as suitable candidates for surrogate motherhood.<sup>314</sup> (The proposed Bill does not define the word 'natural' and exactly what is meant by this requirement is unclear. A possible interpretation is that 'natural' refers to a normal pregnancy as opposed to a pregnancy arising from surrogacy, or that the surrogate mother has experienced natural childbirth and has not given birth by way of caesarean section!)

It is debatable whether this provision, which prevents unmarried women from acting as surrogates, is constitutional.<sup>315</sup> The Commission limits the opportunity to be a surrogate mother to women who have already experienced motherhood and marriage. The rationale being that only these women will appreciate the risks associated with pregnancy and the implications of surrendering the child. This position ignores the growing acceptance of motherhood outside the bounds of marriage. Another argument in favour of restricting the practice to married women is that they are more likely to have strong familial support systems.<sup>316</sup> However, surrogacy may well place additional

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<sup>313</sup> R Alto Charo 'United States: Surrogacy' In Sheila A M Mclean *Law Reform and Human Reproduction* (1992) 223 at 233

<sup>314</sup> Clause 3, Schedule A to the South African Law Commission *Report on Surrogate Motherhood* (Project 65: 1993)

<sup>315</sup> Section 9, *Constitution of the Republic of South Africa Act* 108 of 1996

<sup>316</sup> A Lui *Artificial Reproduction and Reproductive Rights* (1991) 143

stress on the surrogate mother's familial relationships, for example, the surrogate mother's husband may resent her physical and emotional commitment to the pregnancy and her children may experience psychological trauma.

These proposals should be read together with the requirements relating to the genetic origin of the child.<sup>317</sup> The Commission prohibits use of the surrogate mother's gametes or those of her husband.<sup>318</sup> The child must be genetically related to at least one and preferably both of the commissioning parents. In this way, the Commission hopes to minimise the risk of the surrogate mother refusing to relinquish the child, believing that the absence of a genetic link will discourage the surrogate mother from becoming emotionally tied to the child.<sup>319</sup> It is submitted that this view ignores the bond that will form between surrogate mother and child simply by her carrying the child to term. Furthermore, partial surrogacy is the more affordable and medically less invasive option. Meyerson comments that placing too many obstacles in the path of potential commissioning parents is likely to result in them resorting to clandestine arrangements.<sup>320</sup>

The Ad Hoc Parliamentary Select Committee also requires that the surrogate mother is competent and suitable. She must have given birth to children of her own, be

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<sup>317</sup> Clause 5(1), Schedule A to the South African Law Commission *Report on Surrogate Motherhood* (Project 65: 1993)

<sup>318</sup> Clause 5(2) Schedule A to the South African Law Commission *Report on Surrogate Motherhood* (Project 65: 1993)

<sup>319</sup> South African Law Commission *Report on Surrogate Motherhood* (Project 65: 1993) 152-153

<sup>320</sup> D Meyerson 'Surrogacy Agreements'. In Christina Murray (ed) *Gender and the New South African Legal Order* (1994) 139

financially secure,<sup>321</sup> be motivated by reasons of altruism,<sup>322</sup> and have obtained her husband or partner's written consent.<sup>323</sup> In addition, her husband or partner should be a party to the agreement.<sup>324</sup> Thus, in contrast to the Commission, the Committee does not exclude unmarried women from acting as a surrogate mothers.

#### 4.2.3.3. Screening the Parties

The commissioning parents and surrogate mother should be emotionally and physically fit to undertake their respective responsibilities. Hirsch suggests that the physician should conduct a physical examination and ascertain the surrogate mother's history. She should be tested for cervical gonorrhoea, syphilis, HIV, hepatitis, Rh (blood) typing, rubella titer and the physician should establish a month of basal body temperatures demonstrating a biphasic pattern.<sup>325</sup> It is equally important to establish that the surrogate mother is psychologically prepared for the task of carrying a child to term and then relinquishing it. The surrogate mother's physical and psychological strength is critical to the success of the endeavour and great care should be taken in establishing this.

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<sup>321</sup> para 6.4.1.4, Parliamentary Ad Hoc Select Committee on the Report of the South African Law Commission on Surrogate Motherhood *Draft Final Report* dated October 1998 at 35

<sup>322</sup> para 6.4.1.6, Parliamentary Ad Hoc Select Committee on the Report of the South African Law Commission on Surrogate Motherhood *Draft Final Report* dated October 1998 at 35

<sup>323</sup> para 6.4.1.8, Parliamentary Ad Hoc Select Committee on the Report of the South African Law Commission on Surrogate Motherhood *Draft Final Report* dated October 1998 at 35

<sup>324</sup> para 6.4.1.8, Parliamentary Ad Hoc Select Committee on the Report of the South African Law Commission on Surrogate Motherhood *Draft Final Report* dated October 1998 at 35

<sup>325</sup> H Hirsch 'Surrogate Motherhood - The Legal Climate for the Physician' (1986) 5 Medicine and Law 151 at 153

It is just as important to subject the commissioning parents to screening. Where the commissioning father intends donating his gametes he should also be physically healthy and should submit to genetic testing, as well as tests to establish that his sperm is free from diseases such as syphilis, gonorrhoea, HIV and hepatitis.<sup>326</sup> Likewise, where the commissioning mother intends donating her ovum, she should submit to genetic testing as well as any other appropriate medical tests.

The commissioning parents are required to submit evidence of their suitability to be parents, while the surrogate mother must present evidence of both her psychological and physical suitability to act as a surrogate.<sup>327</sup> The Commission's memorandum directs the Court to consider evidence as to the 'physical health, psychological disposition and financial means' of the commissioning parents.<sup>328</sup> The Court should also consider evidence of the physical and psychological suitability of the surrogate mother.<sup>329</sup>

It is submitted that these directions are inadequate. The parties are informed as to the categories of evidence needed (that is, they should prove that they are physically, psychologically and, in the case of the prospective parents, financially suitable persons), but are left in the dark as to how exactly they should go about establishing

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<sup>326</sup> H Hirsch 'Surrogate Motherhood - The Legal Climate for the Physician' (1986) 5 *Medicine and Law* 151 at 154

<sup>327</sup> Clauses 6(2)(b) and (c), Schedule A to the South African Law Commission *Report on Surrogate Motherhood* (Project 65: 1993)

<sup>328</sup> Clause 6(1)(b)(ii) Schedule A to the South African Law Commission *Report on Surrogate Motherhood* (Project 65: 1993)

<sup>329</sup> Clause 6(2)(b), Schedule A to the South African Law Commission *Report on Surrogate Motherhood* (Project 65: 1993)

their suitability. Presumably, they are required to place expert evidence before the court, but it is unclear how far they are required to go to satisfy the evidentiary burden.

Both the Commission and the Committee recognise the importance of screening.<sup>330 331</sup> The Committee observes that 'it is evident that the majority of the problems emanating from surrogacy agreements were brought about by the insufficient screening of the parties'.<sup>332</sup> In this respect, the Committee's proposals are of greater assistance to the parties because they are more detailed. The Committee requires that the parties submit to rigorous screening six months prior to entering into an agreement, as screening is vital to establish whether 'the parties social and psychological backgrounds are compatible and to determine their suitability for surrogacy arrangement'.<sup>333</sup> The parties are assessed by a screening panel, who submit their report to Court. The screening panel's report must address the following issues:

- 1) The parties' physical and psychological suitability;
- 2) the surrogate mother's financial status, and whether or not she is entering into the agreement for financial reasons;
- 3) the parties' familial circumstances;
- 4) the interests of any descendant or adopted child of the parties; and

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<sup>330</sup> para 6.6, Parliamentary Ad Hoc Select Committee on the Report of the South African Law Commission on Surrogate Motherhood *Draft Final Report* dated October 1998 at 38

<sup>331</sup> South African Law Commission *Report on Surrogate Motherhood* (Project 65: 1993) 149

<sup>332</sup> para 6.6, Parliamentary Ad Hoc Select Committee on the Report of the South African Law Commission on Surrogate Motherhood *Draft Final Report* dated October 1998 at 38

<sup>333</sup> para 6.6.1, Parliamentary Ad Hoc Select Committee on the Report of the South African Law Commission on Surrogate Motherhood *Draft Final Report* dated October 1998 at 38

5) the commissioning parents inability to produce a child and whether or not that incapacity is permanent and irreversible.<sup>334 335</sup>

Who should conduct the screening? Although the Commission gives no directions in this respect, the Committee requires that the parties are screened by a state body or private bodies approved by legislation.<sup>336</sup> In addition, it proposes that members of the screening panel should include a social worker, psychologist, psychiatrist, a lawyer and a minister of religion.<sup>337</sup>

It is submitted that there is place for both private screening and screening by state bodies. The advantage of being screened by a panel is that the parties are assessed by a number of experts. Furthermore, the associated costs are likely to be significantly cheaper than if the parties have to establish their suitability by recourse to independent practitioners. However, there can be no harm in allowing the parties to consult with professionals of their choice, provided that they are able to furnish the Court with the required evidence.

What of the possible role of surrogacy agencies or even private medical and legal practitioners in facilitating surrogacy arrangements? Many dispensations have banned

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<sup>334</sup> para 6.6.5.1- 6, Parliamentary Ad Hoc Select Committee on the Report of the South African Law Commission on Surrogate Motherhood *Draft Final Report* dated October 1998 at 39

<sup>335</sup> para 6.6.6.1- 5, Parliamentary Ad Hoc Select Committee on the Report of the South African Law Commission on Surrogate Motherhood *Draft Final Report* dated October 1998 at 39

<sup>336</sup> para 6.6.3, Parliamentary Ad Hoc Select Committee on the Report of the South African Law Commission on Surrogate Motherhood *Draft Final Report* dated October 1998 at 38

<sup>337</sup> para 6.6.3, Parliamentary Ad Hoc Select Committee on the Report of the South African Law Commission on Surrogate Motherhood *Draft Final Report* dated October 1998 at 38

the use of professional brokers or agencies in their haste to discourage surrogacy arrangements or out of fear that commercial agencies may contribute to the exploitation of women and children. While these persons or agencies are interested in making a profit, this does not mean that the services they can provide are not valuable. It is submitted that strict regulation of their activities may be the more appropriate legislative response. While the Commission does allow for compensation for the *bona fide* services of medical or legal professionals,<sup>338</sup> the operation of commercial agencies is prevented by making it an offence to let it be known (in any way or with a view to compensation) that a person may be interested in entering into a surrogate motherhood arrangement.<sup>339</sup>

The commissioning parents may not have the resources to find a suitable surrogate, and may have to rely on 'fortuitous and improbable connections' with uncertain results.<sup>340</sup> Commercial agencies, in particular, have the resources to assess the psychological and physical suitability of the respective parties, weeding out those who are unfit. In addition, these agencies have an interest in ensuring that the arrangement is successful. 'Traditional standards of negligence for professional actors would create incentives for responsible selection and preparation of the surrogate mother...Such incentives would

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<sup>338</sup>Clause 10(3), Schedule A to the South African Law Commission *Report on Surrogate Motherhood* (Project 65: 1993)

<sup>339</sup>Clause 12(2) & (3), Schedule A to the South African Law Commission *Report on Surrogate Motherhood* (Project 65: 1993)

<sup>340</sup>Andrea E Stumpf 'Redefining Mother: A Legal Matrix for New Reproductive Technologies' (1986) 96 *Yale Law Journal* 187 at 187 n 8



not be misplaced because responsible service is especially critical to the lives of the surrogate mother and the child.<sup>341</sup>

#### **4.2.2.4. The Interests of the Parties' Children**

The South African Law Commission requires that the Court should take potential prejudice to the non-material interests of any living descendant or adopted child of the parties into account, before confirming the pre-conception agreement.<sup>342</sup> The Commission also proposes that conclusive evidence should be submitted regarding the family circumstances of the parents.<sup>343</sup> However, how the Court is to go about determining the existence of prejudice, or for that matter the lack thereof, is unclear.

Since few studies have been conducted on surrogacy arrangements, it is difficult to do anything other than speculate as to whether or not the arrangement is prejudicial to the surrogate mother's child(ren). The child loses rather than gains a sibling. While the financial aspects of the arrangement may be indirectly beneficial to a living child of the surrogate, it is hard to see how the experience can be anything other than emotionally damaging. Although some authors argue that if the matter is sensitively addressed,

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<sup>341</sup> Andrea E Stumpf 'Redefining Mother: A Legal Matrix for New Reproductive Technologies' (1986) 96 *Yale Law Journal* 187 at 190 n 57

<sup>342</sup> Clause 6(1)(e), Schedule A to the South African Law Commission *Report on Surrogate Motherhood* (Project 65: 1993)

<sup>343</sup> Clause 6(1)(d), Schedule A to the South African Law Commission *Report on Surrogate Motherhood* (Project 65: 1993)

living children of the surrogate need not be traumatised,<sup>344</sup> other writers fear the opposite to be true. While giving testimony before Congress, Elizabeth Kane, a surrogate mother, revealed the harm that had been done to her family. 'Today I am faced with a broken family. The only thing that I have taught my children is that money can buy anything...One thing that my family will never be able to buy back are the memories that we have lost of my son...I have robbed my children and my parents of a relationship with their relative, and I am not proud of that'.<sup>345</sup>

A surrogate mother faces the risk of physical harm as she undertakes to carry a child to term and give birth to it, a process that may endanger her health, if not her life. This most certainly is prejudicial to the living child's right to parental care. While it is impossible to compensate the children of the surrogate mother for their loss should anything untoward happen to the surrogate mother as a result of the pregnancy, the precaution of making financial provision for just such a situation is recommended.

The living child(ren) of the commissioning parents may also suffer prejudice. While the circumstances are unusual, the child gains a sibling. In any family the birth of a new child brings with it the potential for sibling rivalry. This kind of jealousy is by no means unusual and generally passes once the older child has been reassured as to his or her position in the family and it is doubtful that the Court's would regard the mere fact that the family is being added to as prejudicial to the interests of the living child(ren) of

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<sup>344</sup> Margaret Friedlander Brinig 'A Materialistic Approach to Surrogacy: Comment on Richard Epstein's Surrogacy: The Case for Full Contractual Enforcement' (1995) 81 *Virginia Law Review* 2377 at 2384 n 27

<sup>345</sup> Margaret Friedlander Brinig 'A Materialistic Approach to Surrogacy: Comment on Richard Epstein's Surrogacy: The Case for Full Contractual Enforcement' (1995) 81 *Virginia Law Review* 2377 at 2385 n 27

the commissioning parents. However, the existing children of the commissioning parents may also find the manner in which the new sibling is acquired psychologically disturbing.

### 4.3. Conclusion

It is impossible to protect the parties from all the consequences of their actions. However, the involvement of an innocent and particularly vulnerable third party, namely the child, justifies fairly stringent regulation of the agreement, 'in order to distribute fairly the risks of their transaction to the parties directly involved in it'.<sup>346</sup> Meyerson comments that should the parties enter an agreement that fails to comply with any of the provisions designed to ensure fairness to them, the contract should be upheld in so far as the Court is able to so. It is altogether a different matter where their defiance contravenes rules designed to protect the child. In this event, the agreement should be unenforceable.<sup>347</sup>

The South African Law Commission proposes that surrogacy contracts are valid, provided the parties comply with the provisions of the relevant legislation and have been confirmed by the High Court. Where there is non-compliance, the contract is void and, hence, unenforceable. In this event, the surrogate mother and her husband will be regarded as the child's legal parents, and the commissioning parents will have no claim to the child. Furthermore, the surrogate mother will be unable to compel the

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<sup>346</sup> D Meyerson 'Surrogacy Agreements'. In Christina Murray (ed) *Gender and the New South African Legal Order* (1994) 144

commissioning parents adopt the child. This is particularly worrying as the surrogate mother may be burdened with the responsibility of a child she had not planned for.

In contrast to the Commission, the Parliamentary Ad Hoc Select Committee permits both full and partial surrogacy. In the case of full surrogacy, the Committee provides that where there is non-compliance with any of the legal requirements, the surrogacy agreement is void. The Committee does not discuss non-compliance with respect to partial surrogacy, which would appear to be an oversight on its part.

The contract between the parties contains the totality of rights and obligations between the parties. Thus, it is important that it is comprehensive and contains all the necessary provisions to ensure that the parties are aware of their rights and duties. Both the South African Law Commission and the Parliamentary Ad Hoc Select Committee feel it prudent for a written agreement to be submitted to a Court for confirmation. Only once the Court has approved the agreement can impregnation take place. The advantage of a standard form contract is that the opportunity for including exploitative terms is diminished.

It is submitted that compulsory screening is essential to minimise the risk of harm to the parties. Screening of the surrogate mother is of particular importance in order to establish whether or not she is likely to act responsibly toward the child and is capable

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<sup>347</sup> D Meyerson 'Surrogacy Agreements'. In Christina Murray (ed) *Gender and the New South African Legal Order* (1994) 144

of relinquishing the child at birth.<sup>348</sup> Furthermore, the commissioning parents need to be assessed in order to establish the extent of their commitment to the undertaking, especially should the child be born mentally or physically handicapped.

However, compulsory screening can only be effective as a preventative measure if carefully applied. It is submitted that in this regard the Commission's proposals are sadly lacking, as the Commission fails to properly direct the parties as to who may assess them, and as to the issues that person or persons need address. In contrast, the Committee provides for compulsory screening by a state established screening panel or by a licensed private body, and furnishes a list of topics that are to be the subject of a report regarding the parties suitability. Nonetheless, despite the inclusion of these preventative measures, disputes may still occur at a later stage.

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<sup>348</sup> D Meyerson 'Surrogacy Agreements'. In Christina Murray (ed) *Gender and the New South African Legal Order* (1994) 142

## **CHAPTER FIVE**

### **CONCEPTION AND GESTATION**

#### **5.1. Introduction**

Once the parties have entered into the contract, the next step is to arrange for the impregnation of the surrogate mother, which may be brought about by artificial or natural means. If conception is achieved, the surrogate mother will carry the child to term with the intention of handing the infant to the commissioning parents at birth. These stages of the surrogacy arrangement raise several issues, in particular:

- 1) Whether the parties should be permitted to choose either full or partial surrogacy;
- 2) the legal position of medical professionals involved in rendering professional services to the parties; and
- 3) the rights and duties that exist between the parties during the pregnancy.

The South African Law Commission has chosen to address some of these issues and proposes the following:

1) Surrogacy should be restricted to full (or gestational) surrogacy. In other words, the use of the gametes of either the surrogate mother or her husband is prohibited.<sup>349</sup>

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<sup>349</sup> Clause 5(2), Schedule A to the South African Law Commission *Report on Surrogate Motherhood*





Impregnation is achieved by using the gametes of at least one, if not both, of the commissioning parents;<sup>350 351</sup>

2) conception is to occur within twelve months of the court's confirmation of the agreement;<sup>352</sup>

3) the provisions of the *Human Tissue Act* are applicable to any artificial fertilisation procedure carried out;<sup>353 354</sup>

4) where an abortion is necessary it must be carried out in terms of the provisions of the *Abortion and Sterilisation Act*;<sup>355 356</sup> and

5) medical professionals or other persons, who assist the parties to a surrogacy arrangement by carrying out the artificial fertilisation procedure where the requisite judicial approval has not been obtained, are subject to harsh penalties.<sup>357</sup>

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<sup>350</sup> Clause 5, Schedule A to the South African Law Commission *Report on Surrogate Motherhood* (Project 65, 1993)

<sup>351</sup> The Commission proposes that the gametes of at least one of the commissioning parents be used to effect impregnation prevents commissioned adoption. In other words, where neither of the commissioning parents is able to provide gametes, they are unable to utilise surrogacy as a solution to their infertility.

<sup>352</sup> Clause 7(1)(b), Schedule A to the South African Law Commission *Report on Surrogate Motherhood* (Project 65, 1993)

<sup>353</sup> Section 1 of the Act defines artificial fertilisation as being the 'introduction by other than natural means of a male gamete or gametes into the internal reproductive organs of a female person for the purpose of human reproduction, including a) the bringing together outside the human body of a male and female gamete or gametes with a view to placing the product of a union of such gametes in a womb of a female person; or b) the placing of the product of a union of a male and female gamete or gametes which have been brought together outside the human body, in the womb of a female person for such purpose'. The Regulations in terms of section 37 of the Human Tissue Act, as amended by Government Notice R1354 in Government Gazette 18362 of 17 October 1997, regulate *inter alia* the donation of gametes, and artificial fertilisation. *Human Tissue Act* 65 of 1983

<sup>354</sup> Clause 7(2), Schedule A to the South African Law Commission *Report on Surrogate Motherhood* (Project 65, 1993)

<sup>355</sup> *Abortion and Sterilisation Act* 2 of 1975. Since the South African Law Commission published its proposals there have been considerable changes to abortion laws, and the *Choice on Termination of Pregnancy Act* 92 of 1996 now legislates the matter of abortion.

<sup>356</sup> Clause 9, Schedule A to the South African Law Commission *Report on Surrogate Motherhood* (Project 65, 1993)

The Commission's proposals can be criticised for failing to consider a number of issues. In particular, the Commission's stance with respect to partial surrogacy is ill considered. In addition, the Commission fails altogether to address the issue of contractual limitations on the surrogate's conduct during the course of her pregnancy.

## 5.2. Full or Partial Surrogacy

As previously discussed, there are different forms of surrogacy. Partial (or traditional surrogacy), is the more commonly practised, and occurs where the surrogate mother's own ovum is fertilised by means of artificial insemination. Full (or gestational) surrogacy occurs where the gametes of one or both of the commissioning parents are used to effect the pregnancy, the surrogate mother providing no genetic material. (Where the commissioning parents are only able to provide either sperm or eggs, donor gametes are used). In this instance ova are fertilised *in vitro* and then implanted in the surrogate mother.

As mentioned previously, surrogacy can occur without medical intervention and is sometimes referred to as natural surrogacy. This form of surrogacy is known to occur in South Africa, especially in black communities where women face abandonment should they fail to produce a child.<sup>358</sup>

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<sup>357</sup> Clause 12(3), Schedule A to the South African Law Commission *Report on Surrogate Motherhood* (Project 65, 1993)

The South African Law Commission requires that conception is effected by the use of the gametes of at least one of the commissioning parents.<sup>359</sup> The use of donor gametes is permitted,<sup>360</sup> but neither the surrogate mother nor her husband may provide their gametes.<sup>361</sup> The Commission states that 'if it were to be permitted to use donor gametes in legal surrogate motherhood, the use of the gametes of the surrogate and/or her husband should never be permitted'.<sup>362</sup> In other words, the Commission permits only full surrogacy, and not partial or natural surrogacy. It should be noted that a failure to adhere to this provision will result in the contract being void and, hence, unenforceable.<sup>363</sup>

The Commission's proscription of any form of surrogacy, other than full surrogacy, deserves careful consideration, and would appear to be motivated by the desire to avoid the possibility of a dispute between the parties with respect to parentage. The Commission reasons that where the surrogate mother has used her own gametes, there can be almost no justification for a decision to compel her to hand over her child.<sup>364</sup> Furthermore, the Commission is of the opinion that the existence of a genetic

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<sup>358</sup> 'The Miracle of Birth for Barren Women. Surrogate Mums in Demand' *Weekend Argus* 5-6 July 1997

<sup>359</sup> Clause 5, Schedule A to the South African Law Commission *Report on Surrogate Motherhood* (Project 65, 1993)

<sup>360</sup> Clause 5, Schedule A to the South African Law Commission *Report on Surrogate Motherhood* (Project 65, 1993)

<sup>361</sup> Clause 5(2), Schedule A to the South African Law Commission *Report on Surrogate Motherhood* (Project 65, 1993)

<sup>362</sup> South African Law Commission *Report on Surrogate Motherhood* (Project 65, 1993) 152

<sup>363</sup> Clause 5(1), Schedule A to the South African Law Commission *Report on Surrogate Motherhood* (Project 65, 1993)

<sup>364</sup> South African Law Commission *Report on Surrogate Motherhood* (Project 65: 1993) 152

relationship between the child and at least one of its intended parents, will facilitate bonding between them.<sup>365</sup>

While well intentioned, the Commission's reasoning can be criticised for placing too great an emphasis on the genetic aspect of parenthood. This approach denies the significance of the relationship that develops between the surrogate mother and the child during gestation. Much has been written regarding maternal bonding *in utero*,<sup>366</sup> and it appears that the absence of a genetic relationship will not always make it easier for the surrogate mother to relinquish the child. A study conducted by the American College of Obstetricians and Gynaecologists noted that maternal attachment in the case of gestational surrogacy is as great as it would have been had there been a genetic relationship.<sup>367</sup> Studies on the effects of relinquishment in the case of adoption describe the feelings of new mothers who are separated from their children. 'New mothers experience a kind of separation anxiety when they are separated from their children even for relatively short periods of time. When the separation is permanent, the experience may take on extreme, even pathological proportions, including a deep sense of loss which pervades daily activities. Depression, anxiety, and a host of other emotional consequences may result'.<sup>368</sup>

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<sup>365</sup> [T]he Commission remains convinced that in order to promote the bond between the child and its commissioning parents it is desirable, in the best interest of such a child, that the gametes of at least one of the commissioning parents should be used'. South African Law Commission *Report on Surrogate Motherhood* (Project 65, 1993) 151

<sup>366</sup> See David MacPhee and Kathy Forest 'Surrogacy: Programme Comparisons and Policy Implications' (1990) 4 *International Journal of Law and the Family* 308-317

<sup>367</sup> *Debates of the National Assembly (Hansard)* Wednesday 18 June 1997 col 4056

Thus, the absence of a genetic relationship may not prevent the custodial disputes that the Commission is clearly hoping to avoid. Brinig states that 'women are not programmed to have children and then part with them. A contract made beforehand, even though it may make the rational part of the placement easier, cannot effect these biological drives'.<sup>369</sup>

The case of *Johnson v Calvert*,<sup>370</sup> illustrates the difficulties involved in attempting to determine parenthood in the case of gestational surrogacy by relying solely on biological or genetic factors. Anna Johnson, the surrogate mother, argued that nature inevitably caused her to form a bond with her child during gestation, a bond of such strength that expert testimony described it as being a 'bond of love'.<sup>371</sup> In addition, the surrogate mother asserted that like the commissioning parents she too could prove her blood relationship to the baby. The baby was born with her hormones and antibodies which would clearly identify her as being the biological mother.<sup>372</sup> The commissioning parents were also able to demonstrate parenthood based on their genetic relationship to the child, by means of blood tests. Dolgin concludes that the effect of the parties

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<sup>368</sup> John Lawrence Hill 'What Does It Mean to Be a "Parent"? The Claims of Biology as the Basis for Parental Rights' (May 1991) 66 *New York University Law Review* 353 at 405

<sup>369</sup> Margaret Friedlander Brinig 'A Maternalistic Approach to Surrogacy: Comment of Richard Epstein's Surrogacy: The Case for Full Contractual Enforcement' (1995) 81 *Virginia Law Review* 2377 at 2384

<sup>370</sup> *Johnson v Calvert* 851 P 2d 776 (1993)

<sup>371</sup> The case is extensively discussed by Dolgin, who quotes the testimony of the surrogate mother's psychiatrist to the California Court of Appeal : 'In my interview with Ms Johnson, she talked tearfully about the experience of nursing the baby ... of her belief that he recognises her odour, and when she has him he roots to nurse since she has continued to nurse even during the visitations. She believes that he feels safe and falls asleep easily in her arms' Janet L Dolgin 'The Law Debates the Family: Reproductive Transformations' (1995) 7(1) *Yale Journal of Law and Feminism* 37 at 51-52.

<sup>372</sup> Janet L Dolgin 'The Law Debates the Family: Reproductive Transformations' (1995) 7(1) *Yale Journal of Law and Feminism* 37 at 54

arguments is to 'almost neutralise each other, so that the identification of a single real mother on the basis of biological facts and arguments presented becomes largely a matter of social choice'.<sup>373</sup> In this instance, the Court decided the case in favour of the commissioning parents basing its decision on their intention to create the child.

*McDonald v McDonald* is another case in point.<sup>374</sup> Although this case did not involve a surrogacy arrangement, it demonstrates the inadequacy of relying solely on genes to explain and assign parenthood. The birth mother, Mrs McDonald, was unable to provide ova, and was not genetically related to her daughters but was married to their genetic father. On their divorce, Mr McDonald claimed sole custody of the children on the basis that he was their sole genetic parent. The Court rejected his argument and found Mrs MacDonald, the birth mother, to be a parent of the children. Mrs MacDonald argued that her biological maternity was evidence of her motherliness,<sup>375</sup> describing gestation as but 'one stage in the "nourishment and care" that a good mother gives her children'.<sup>376</sup>

The cases discussed above clearly demonstrate that the advent of reproductive technologies challenge our understanding of parenthood, as both the surrogate mother and commissioning parents are able to present credible arguments in support of their parentage. It follows that if both the commissioning parents and the surrogate mother

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<sup>373</sup> Janet L Dolgin 'The Law Debates the Family: Reproductive Transformations' (1995) 7(1) *Yale Journal of Law and Feminism* 37 at 55

<sup>374</sup> *McDonald v McDonald* 608 N.Y.S. 2d 477 (App. Div. 1994)

<sup>375</sup> Janet L Dolgin 'The Law Debates the Family: Reproductive Transformations' (1995) 7(1) *Yale Journal of Law and Feminism* 37 at 62

are able to establish a blood relationship to the child, despite the absence of a genetic relationship on the part of the surrogate mother, other factors will have to be taken into account in determining parentage.

As gestational surrogacy is far more costly than partial surrogacy, the South African Law Commission's insistence on gestational surrogacy is discriminatory towards potential commissioning parents as only those commissioning parents who can afford the expense of infertility treatment will have access to surrogacy. In addition, gestational surrogacy involves complicated medical procedures, with no guarantee of success. Meyerson comments that if the commissioning mother is unable to donate eggs, a donor will have to be found. '[E]gg donation is not like sperm donation. It requires risky hormone treatment and surgical extraction of the egg. Even supposing that the couple are lucky enough to find an egg donor, or that the commissioning mother is able to conceive or merely needs the surrogate to carry her baby, this is not the end of the story. The egg will need to be fertilised outside the surrogate mother's body and then implanted in her after artificially manipulating her cycle'.<sup>377</sup> It is submitted that by insisting on this form of surrogacy, the Commission's proposals may be largely self defeating, as desperate people are likely to resort to clandestine partial surrogacy arrangements as the only practical way of having a child.<sup>378</sup>

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<sup>376</sup> Janet L Dolgin 'The Law Debates the Family: Reproductive Transformations' (1995) 7(1) *Yale Journal of Law and Feminism* 37 at 64

<sup>377</sup> D Meyerson 'Surrogacy Agreements'. In Christina Murray (ed) *Gender and the New South African Legal Order* (1994) 138

<sup>378</sup> D Meyerson 'Surrogacy Agreements'. In Christina Murray (ed) *Gender and the New South African Legal Order* (1994) 138

In addition, by insisting on gestational surrogacy the Commission's proposals may fall foul of the Constitution.<sup>379</sup> The Constitution guarantees the right to bodily and psychological integrity, which includes the right to make decisions concerning reproduction.<sup>380</sup> While this right is subject to the limitation clause,<sup>381</sup> it is possible to argue that the right is broad enough to enable the parties to effect conception by any means and not just by way of gestational surrogacy. Certainly, it is hard to justify the prohibition of other forms of surrogacy in the absence of proof that this restriction of surrogacy is reasonable and justifiable.

An additional concern is that the consequence of failure to comply with the provisions of the proposed bill will result in the contract's invalidity. Should a contract be invalid, the child will be deemed to be the child of the birth mother,<sup>382</sup> contrary to the intention of the parties. This fails to protect the interests of any of the parties to the contract, and the surrogate mother is placed in a particularly difficult position as she may find herself responsible for a child she had not planned for.<sup>383</sup>

The Parliamentary Ad Hoc Select Committee proposes that both full and partial surrogacy be permitted. However, the Committee is of the belief that partial surrogacy should only be used where 'it is not possible, for biological or medical reasons, to use

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<sup>379</sup> *Constitution of the Republic of South Africa Act 108 of 1996*

<sup>380</sup> Sections 12 (2)(a), *Constitution of the Republic of South Africa Act 108 of 1996*

<sup>381</sup> Section 36, *Constitution of the Republic of South Africa Act 108 of 1996*

<sup>382</sup> Clause 8, Schedule A to the South African Law Commission *Report on Surrogate Motherhood* (Project 65, 1993)

<sup>383</sup> D Meyerson 'Surrogacy Agreements'. In Christina Murray (ed) *Gender and the New South African Legal Order* (1994) 143











the female gamete of the commissioning parent for the purpose of artificial fertilisation'.<sup>384</sup> The Committee discusses the issue of cost and mentions that most commentators are of the belief that as surrogacy is an expensive procedure, state-funded fertility clinics should provide assistance to those who otherwise would be unable to afford the procedure.<sup>385</sup> In the light of the scarcity of resources in South Africa, and the difficulties experienced by the state in delivering even primary health care, it is hard to see how it will find the funds to provide fertility clinics.

### 5.3. The Role of Medical and Other Health Professionals

Medical professionals play an important role in the execution of surrogacy arrangements. Neither the South African Law Commission nor the Parliamentary Ad Hoc Select Committee provide much guidance regarding the legal position of medical professionals who assist the parties to a surrogacy agreement. The Commission merely proposes that artificial fertilisation of the surrogate mother shall not take place before the surrogacy agreement is confirmed by the relevant court,<sup>386</sup> or after the lapse of twelve months from the date of confirmation of the agreement by the court.<sup>387</sup> The provisions of the *Human Tissue Act* are applicable to any artificial fertilisation

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<sup>384</sup> para 6.3.2, Parliamentary Ad Hoc Select Committee on the Report of the South African Law Commission on Surrogate Motherhood *Draft Final Report* dated October 1998 at 34

<sup>385</sup> para 5.9.9.4, Parliamentary Ad Hoc Select Committee on the Report of the South African Law Commission on Surrogate Motherhood *Draft Final Report* dated October 1998 at 33

<sup>386</sup> Clause 7(1)(a), Schedule A to the South African Law Commission *Report on Surrogate Motherhood* (Project 65, 1993)

<sup>387</sup> Clause 7(1)(b), Schedule A to the South African Law Commission *Report on Surrogate Motherhood* (Project 65, 1993)

procedure carried out in execution of a surrogacy agreement.<sup>388</sup> A person who artificially fertilises or who assists in artificially fertilising a woman in execution of a surrogacy agreement where a court has not confirmed the agreement or where the requisite authorisation has lapsed, may be guilty of a criminal offence.<sup>389</sup>

The regulations to the *Human Tissue Act* control, *inter alia*, the donation of gametes and artificial fertilisation, and would be applicable in surrogacy situations.<sup>390</sup> Regulation 4 describes the duties of a medical practitioner intending to remove gametes from the body of a living person for the purpose of artificial insemination of another person. Regulation 8(2) provides that no gametes which are removed outside the provisions of these regulations shall be used for the purpose of the artificial insemination of a person.

Regulation 9 provides that the medical practitioner must open a file for the recipient of artificial fertilisation. Of interest is regulation 9(e) which provides that the medical practitioner shall make sure that ' (i) before any artificial insemination is effected on the recipient, the recipient and her husband in the case of a married person must receive advice and information from appropriate experts concerning - (aa) the possibilities, if any, of the recipient's being able to conceive in a natural manner; (bb) all the

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<sup>388</sup> Clause 7(2), Schedule A to the South African Law Commission *Report on Surrogate Motherhood* (Project 65, 1993)

<sup>389</sup> 'Any person who contravenes this section ... shall be guilty of an offence and liable on conviction to a fine not exceeding R 20 000 or to imprisonment for a period not exceeding one year or to both such fine and such imprisonment'. Clauses 12(1) & (3), Schedule A to the South African Law Commission *Report on Surrogate Motherhood* (Project 65, 1993)

<sup>390</sup> The regulations to the *Human Tissue Act* 65 of 1983 were published under Government Notice R1182 in Government Gazette 10283 of 2 June 1986, and amended by Government Notice R1354 in Government Gazette 18362 of 17 October 1997

implications of artificial insemination ..., [and] (ii) the recipient is biologically, physically, socially and mentally suited for artificial insemination'.

The regulations also provide that it should be determined whether or not the recipient or donor are carriers of a genetic defect. Regulation 9(v)(bb) provides that where it is established that the donor is a carrier or a probable carrier of the defect concerned, then the gametes of said donor shall not be used for artificial insemination. Medical practitioners have a duty to establish the suitability of the recipient to undergo artificial fertilisation. In addition, it must be established whether there is the possibility that either the donor or recipient is the carrier of genetic defects. Thus, this legislation provides for certain screening mechanisms which would be applicable to surrogacy. However, these provisions may be insufficient for the purposes of surrogacy and require supplementation.

#### **5.4. The Surrogate Mother's Conduct During Pregnancy**

It is of great concern that the South African Law Commission fails to address the effect of contractual terms which would restrict the conduct of the surrogate mother during the pregnancy. Presumably these provisions would be scrutinised by the court when it considers the pre-conception agreement. However, the proposed bill gives no guidelines as to how a court should view such conditions. The Parliamentary Ad Hoc Select Committee is also remiss in its failure to address this problem.

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All parties to the contract have an interest in establishing the limits of legitimate interference with the surrogate mother's pre-natal conduct. Certainly, it is to the commissioning parents' advantage to include terms that would prevent the surrogate from engaging in activities which may be potentially harmful to both herself and the foetus. Yet these terms may well conflict with the surrogate mother's personal freedom. The question arises to what extent the surrogate mother should be permitted to control the course of her pregnancy, possibly acting against the wishes of the commissioning parents.

Stumpf argues that the law should provide the surrogate mother with a guarantee that she will enjoy the same rights during her pregnancy as any other pregnant woman.<sup>391</sup> She states that 'once the embryo is implanted in the womb of the surrogate, the process enters the realm of privacy which entails substantial personal freedom for the gestating mother'.<sup>392</sup>

This assertion raises two important points. Firstly, exactly what rights do pregnant women enjoy, and secondly, should surrogate pregnancies be treated differently to 'normal' pregnancies? The fact that the surrogate mother has contracted to bear a child on behalf of the commissioning parents means that they have an interest in ensuring that her conduct in no way endangers the child's well being. Kilroe argues that the

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<sup>391</sup> Andrea A Stumpf 'Redefining Mother: A Legal Matrix for New Reproductive Technologies' (1986) 96 *Yale Law Journal* 187 at 204

<sup>392</sup> Andrea A Stumpf 'Redefining Mother: A Legal Matrix for New Reproductive Technologies' (1986) 96 *Yale Law Journal* 187 at 204



'extent of the surrogate's autonomy during pregnancy is weighted against the extent of the commissioning parents right of control over her'.<sup>393</sup>

Any legal recognition of restrictions on the surrogate's conduct during gestation is fraught with problems. Contractual freedom is never absolute, and while a surrogate may agree to abide by the restrictions contained in a contract, certain restrictions may be judged to be too burdensome or may even set a dangerous precedent for womankind. This forms part of a larger concern relating to the sphere of legitimate intrusion into an individual's right to bodily autonomy. Even if the parties were to include contractual terms that regulated the conduct of the surrogate mother, to what extent should these terms be enforceable by an aggrieved party?

Kilroe discusses the legal remedies available to commissioning parents who fear that the surrogate mother's conduct may be harmful to the foetus. The couple could apply to Court for an order preventing the surrogate mother from continuing with the prohibited activity. Alternatively, the couple can claim damages. Kilroe submits that while it is theoretically possible for the court to grant an interdict, it will be impossible for the order to be enforced unless, for example, the Court is prepared to confine the surrogate to prevent her from engaging in the prohibited activity. She concludes that this would be *contra bonos mores*, and as such it is unlikely that the Court would ever grant such an order.<sup>394</sup>

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<sup>393</sup> B A Kilroe Surrogate Motherhood: A Regulated Approach (no date) 11

<sup>394</sup> B A Kilroe Surrogate Motherhood: A Regulated Approach (no date) 12

There are several cases in the United States that document legally sanctioned violations of pregnant women's physical integrity.<sup>395</sup> These violations are justified by reference to the best interests of the unborn child, and emphasise a disturbing trend which views the interests of mother and child as separate and even antagonistic. 'The earlier model for the woman-foetus relationship was interdependence ... Now, doctors regard the foetus as a separate patient, and the law recognises the foetus as a being with independent interests'.<sup>396</sup> Consequently, in certain circumstances, the foetus is seen as requiring legal protection from its mother's conduct.

As mentioned above, a number of decisions have approved interference with a pregnant woman's rights to physical autonomy where the foetus is regarded as being at risk. These decisions authorised medical professionals to perform various invasive medical procedures, including caesarean sections, despite the refusal of the woman concerned to undergo the procedure. In *re A. C.* the patient, Angela Carder, had been diagnosed as having leukaemia at the age of thirteen but had been in remission three years prior to falling pregnant. At the relevant time she was twenty-seven years of age. She was hospitalised in the twenty-sixth week of her pregnancy and it appeared that her condition was deteriorating rapidly. Despite believing that the foetus would have a better chance of survival if delivered at twenty-eight weeks, the doctors felt that a caesarean section should be performed. Angela Carder refused to consent, but a court

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<sup>395</sup> See *In Re A.C.* 533 A 2d.611 (1987). See also *In Re Stevens S.* 178 Cal.Rptr.525 (Ct.App.1981)

<sup>396</sup> Lisa C Ikemoto 'The Code of Perfect Pregnancy: At the Intersection of the Ideology of Motherhood, the Practice of Defaulting to Science and the Interventionist Mindset of the Law' (1993) 53(5) *Ohio State Law Journal* 1205 at 1293-1294

order was obtained and the caesarean section was performed. Both mother and foetus died soon after the surgery.<sup>397</sup>

Other decisions have aimed at preventing mothers from engaging in behaviour regarded as dangerous to the foetus' well-being (even where this would involve some kind of physical restraint or imprisonment).<sup>398</sup> These decisions have been criticised as having 'less to do with the status of the foetus than with the moral and legal status of women. They reinforce deep societal stereotypes of women, particularly of pregnant women, as somehow incompetent to make moral decisions'.<sup>399 400</sup>

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<sup>397</sup> *In re A.C.* 533 A 2d.611 (1987). The Court subsequently granted a petition for rehearing, *In the Matter of A.C.* 539 A 2d.203 (1988). The District of Columbia Court of Appeals subsequently reversed its decision in the case of *In re A.C.* 573 A 2d. 1235, 1990. Leanna Darvall *Medicine, Law and Social Change: The Impact of Bioethics, Feminism and Rights Movements on Medical Decision Making* (1993) 10-11

See also Lisa C Ikemoto 'The Code of Perfect Pregnancy: At the Intersection of the Ideology of Motherhood, the Practice of Defaulting to Science and the Interventionist Mindset of the Law' (1993) 53(5) *Ohio State Law Journal* 1205 at 1241-1242

<sup>398</sup> *In re Stevens S.* 178 Cal.Rptr.525 (Ct.App.1981), the Court detained the 'foetus, and accordingly [Kay S.] detained'. The terms of the order were that Kay S. be detained until the birth of her child. In *United States v Vaughn* 117 DAILY.WASH.L.REP. 441 (1989)(D.C.Super.Ct), the mother's cocaine habit was the judge's reason for ordering her incarceration for 180 days, despite the prosecutor's recommendation that she be given probation. Lisa C Ikemoto 'The Code of Perfect Pregnancy: At the Intersection of the Ideology of Motherhood, the Practice of Defaulting to Science and the Interventionist Mindset of the Law' (1993) 53(5) *Ohio State Law Journal* 1205 at 1250

<sup>399</sup> Leanna Darvall *Medicine, Law and Social Change: The Impact of Bioethics, Feminism and Rights Movements on Medical Decision Making* (1993) 11

<sup>400</sup> Ikemoto discusses instances where there has been direct judicial interference with the choices of pregnant women. She cites cases where women have been forced to undergo caesarean sections, to have a hospital delivery, to have life support and have been forced to undergo prenatal treatment. In each case the state has stepped in to enforce medical opinion that intervention is necessary. The prevailing view seems to be that consent is the choice of the good mother, whereas refusal is unnatural. It would seem that women are expected to sacrifice their own interests for that of the child they are carrying. Lisa C Ikemoto 'The Code of Perfect Pregnancy: At the Intersection of the Ideology of Motherhood, the Practice

The Constitution does guarantee a right to psychological and physical integrity, as well as a right to privacy, which can be interpreted to prevent unwarranted interference with the physical autonomy of the surrogate mother during the pregnancy.<sup>401</sup> In addition, the Constitution protects against unfair discrimination, including unfair discrimination on the ground of pregnancy.<sup>402</sup> However, the legal recognition and subsequent enforcement of any restrictive contractual conditions may amount to a violation of these rights. Nevertheless, section 28(2) of the Constitution ensures that the best interests of the child are always paramount in matters concerning children.<sup>403</sup> Since legal personality begins at birth, a foetus lacks the rights of a child, and section 28(2) is therefore not applicable.

A woman's right to control the course of her pregnancy, is further endangered by potential delictual liability for pre-birth injuries. In the United States, it has been held that the doctrine of parental immunity is no longer wholly operative, and that it is possible for children to sue their parents for harm inflicted on the child by the parent during pregnancy,<sup>404</sup> as illustrated by the case of *Grodin v Grodin*.<sup>405</sup> Ms Grodin was sued by her son because she had taken an antibiotic during her pregnancy that had resulted in the discoloration of her son's teeth. He alleged that she had failed to 'seek

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of Defaulting to Science and the Interventionist Mindset of the Law' (1993) 53(5) *Ohio State Law Journal* 1205

<sup>401</sup> Section 12, *Constitution of the Republic of South Africa Act* 108 of 1996

<sup>402</sup> Section 9, *Constitution of the Republic of South Africa Act* 108 of 1996

<sup>403</sup> Section 28(2), *Constitution of the Republic of South Africa Act* 108 of 1996

<sup>404</sup> Lisa C Ikemoto 'The Code of Perfect Pregnancy: At the Intersection of the Ideology of Motherhood, the Practice of Defaulting to Science and the Interventionist Mindset of the Law' (1993) 53(5) *Ohio State Law Journal* 1205 at 1262

proper prenatal care'. The trial court found for Ms Grodin but on appeal it was held that while 'a woman's decision to continue taking drugs during pregnancy is an exercise of her discretion, the focal question is whether the decision reached by a woman in a particular case was a 'reasonable exercise of parental discretion', and the matter was remanded for expert evidence to be presented regarding the reasonableness of the defendants decision to take the medication in question.<sup>406</sup>

In South Africa, the position appears to be less extreme than in the United States. Nevertheless, there are indications that legal precedent may support a claim seeking to hold a parent accountable for pre-birth injuries. Legal personality begins at birth, and while there are instances where the court will recognise the interests of an unborn child, these are always subject to the proviso that the child is subsequently born alive. The case of *Pinchin v Santam Insurance Company Limited*,<sup>407</sup> established that a child may have a delictual action against a third party for harm caused while *in utero* (provided that the child is subsequently born alive). The court intimated that the child might even have an action against its own mother for harm caused *in utero*.<sup>408</sup> The commissioning parents would have to establish a causal connection between the surrogate mother's

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<sup>405</sup> 301 N.W.2d 869 (Mich.Ct.App.1980)

<sup>406</sup> Lisa C Ikemoto 'The Code of Perfect Pregnancy: At the Intersection of the Ideology of Motherhood, the Practice of Defaulting to Science and the Interventionist Mindset of the Law' (1993) 53(5) *Ohio State Law Journal* 1205 at 1262

See also John Robertson 'Procreative Liberty and the Control of Conception, Pregnancy and Childbirth' (1983) 69(3) *Virginia Law Review* 405 at 441-42

<sup>407</sup> *Pinchin v Santam Insurance Company Limited* 1963 (2) SA 254 (W)

<sup>408</sup> Per Hiemstra J 'When a rule, previously limited, is extended to a new field, one is apt to ask where it is to stop. What, for instance, of a case where the mother injures her infant in an attempted abortion? Would he after birth have an action against his own mother? Difficulties of proof would probably confine such a case to the academic sphere, but I do not see why even in such a case the child should not have an action'. *Pinchin v Santam Insurance Company Limited* 1963 (2) SA 254 (W) at 260

conduct and the ill health or defect experienced by the child. In *Pinchin*, the plaintiff was unable to establish causation, and the Court's comments on the existence of such a claim are *obiter dicta*. However, this decision has stood for many years, is in line with other jurisdictions, and it is submitted that it can be regarded as persuasive authority.

Kilroe discusses the issue of how damages would be measured and in particular whether it is possible to make an assessment where a child is born with a defect. She likens it to the problem posed by wrongful life claims, where it is impossible to place the person in the position he or she was in prior to the wrongful and blameworthy conduct of the wrongdoer as he or she was born defective. Kilroe advocates that the approach of the Court in *Curlender v Bio-Science Laboratories*,<sup>409</sup> where the Court artificially constructed the award of damages 'for the pain and suffering to be endured during the life-span available to such child, and any special pecuniary loss resulting from the "impaired condition" should be followed.<sup>410</sup>

The bill places the surrogate mother in a very difficult position. Although she is the birth mother, she is legally in the position of a third party (the commissioning parents are the child's legal parents),<sup>411</sup> and is possibly liable for pre-birth injuries. The (many) drawbacks to this approach are obvious, and Ikemoto argues that recognition of such an

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<sup>409</sup> 165 Cal. Rptr. 477 (Ct. App. 1980)

<sup>410</sup> 165 Cal. Rptr. 477 (Ct. App. 1980) at 489, quoted in B A Kilroe Surrogate Motherhood: Regulated Motherhood (no date) 14

<sup>411</sup> 'Any child born as a result of the artificial fertilisation of the surrogate mother in accordance with the agreement shall for all purposes be the child of the commissioning parents as if the commissioning wife had given birth to the child within her marriage to the commissioning husband'. Clause 8(1)(a), Schedule A to the South African Law Commission *Report on Surrogate Motherhood* (Project 65, 1993)

action would result in 'mother and child [being] legal adversaries from the moment of conception'.<sup>412</sup>

### 5.5. Abortion

Abortion in the context of a surrogate motherhood arrangement has yet to be documented in practice.<sup>413</sup> However, it is a potential source of conflict, and at the very least, the following issues need to be addressed:

- 1) The circumstances in which a termination may be carried out;
- 2) with whom the decision to carry out an abortion will lie; and
- 3) the effect of the termination on the surrogate arrangement and liability for contractual damages in the event of termination.

The South African Law Commission proposals were published prior to enactment of the *Choice on Termination of Pregnancy Act*,<sup>414</sup> and provide that an abortion carried out in terms of the *Abortion and Sterilisation Act* will terminate a surrogate motherhood agreement.<sup>415 416</sup> The proposals state that the decision to terminate the

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<sup>412</sup> Lisa C Ikemoto 'The Code of Perfect Pregnancy: At the Intersection of the Ideology of Motherhood, the Practice of Defaulting to Science and the Interventionist Mindset of the Law' (1993) 53(5) *Ohio State Law Journal* 1205 at 1263

<sup>413</sup> *Debates of the National Assembly (Hansard)* Wednesday 18 June 1997 col 4070-4071

<sup>414</sup> *Choice on Termination of Pregnancy Act* 92 of 1996

<sup>415</sup> *Abortion and Sterilisation Act* 2 of 1975

<sup>416</sup> Clause 9(1), Schedule A to the South African Law Commission *Report on Surrogate Motherhood* (Project 65, 1993)

pregnancy shall lie with the surrogate mother,<sup>417</sup> but that the commissioning parents shall be informed of the circumstances and shall be allowed to consult with the surrogate mother before the abortion is performed.<sup>418</sup>

However, the law pertaining to abortion has changed since the Commission published its recommendations and the *Choice on Termination of Pregnancy Act* now regulates access to abortion.<sup>419</sup> Whereas previously South African women were only allowed access to abortion in very limited circumstances,<sup>420</sup> the new Act provides for abortion on request up to twelve weeks into the pregnancy.<sup>421</sup> Thereafter, as the pregnancy progresses, the Act places increasing restrictions on access to abortion.<sup>422</sup> The act

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<sup>417</sup> Clause 9(2), Schedule A to the South African Law Commission *Report on Surrogate Motherhood* (Project 65, 1993)

<sup>418</sup> Clause 9(3), Schedule A to the South African Law Commission *Report on Surrogate Motherhood* (Project 65, 1993)

<sup>419</sup> *Choice on Termination of Pregnancy Act* 92 of 1996

<sup>420</sup> The circumstances in which an abortion could be performed in terms of the *Abortion and Sterilisation Act* 2 of 1975 were, 'namely where the continued pregnancy would endanger the life of the woman concerned or would constitute a serious threat to her physical or mental health, or where there exists a serious risk that the child to be born would suffer from a physical or mental defect of such a nature that he would be irreparably seriously handicapped, or where the foetus is alleged to have been conceived as a result of unlawful intercourse, that is rape, incest, or intercourse with a woman who is feeble-minded or an idiot'. Barnard, Cronje and Olivier *The South African Law of Persons and Family Law* (1986) 19

<sup>421</sup> Section 2(1)(a), *Choice on Termination of Pregnancy Act* 92 of 1996

<sup>422</sup> Section 2 of *Choice on Termination of Pregnancy Act* 92 of 1996 provides in which circumstances an abortion may be carried out. Section 2(1)(a) provides that a pregnancy may be terminated upon request of a woman during the first twelve weeks of the gestation period of her pregnancy. Section 2(1)(b) provides that a termination may be performed between the thirteenth and twentieth week if a medical practitioner after consultation with the pregnant woman is of the opinion that (i) the continued pregnancy would pose a risk of injury to the woman's physical or mental health; or (ii) there exists a substantial risk that the foetus would suffer from severe physical or mental abnormality; or (iii) the pregnancy resulted from rape or incest; or (iv) the continued pregnancy would significantly affect the social or economic circumstances of the woman. Section 2(1)(c) provides that after the twentieth week of the gestation period a termination may be performed if a medical practitioner after consultation with another medical practitioner or a registered midwife is of the opinion that the continued pregnancy would



specifically states that only the consent of the pregnant woman is required for the termination of pregnancy,<sup>423</sup> even where the woman is a minor.<sup>424</sup> Furthermore, the identity of a woman undergoing an abortion is protected.<sup>425</sup>

These changes suggest that this aspect of the Commission's proposals should be redrafted. Whereas previously, an abortion might be carried out in limited circumstances the new act has significantly relaxed access to abortion, even permitting termination on demand up to 12 weeks into the pregnancy. Thus, the Commission's proposal that the commissioning parents be consulted before the abortion is performed will be difficult to enforce.

The Parliamentary Ad Hoc Select Committee deals with abortion by requiring the parties to make provision in their agreement for 'all eventualities which could lead to the surrogate mother or the commissioning parents requesting an abortion. The agreement may state that the surrogate mother will, where she decides to terminate the pregnancy for non-therapeutic reasons, be responsible for repaying and reimbursing all the necessary expenses incurred by the commissioning parents in respect of her pregnancy'.<sup>426</sup>

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(i) endanger the woman's life; (ii) would result in severe malformation of the foetus; or (iii) would pose a risk of injury to the foetus

<sup>423</sup> Section 5(2), *Choice on Termination of Pregnancy Act* 92 of 1996

<sup>424</sup> Section 5(3), *Choice on Termination of Pregnancy Act* 92 of 1996

<sup>425</sup> Section 7(5), *Choice on Termination of Pregnancy Act* 92 of 1996

<sup>426</sup> para 6.7.4.7, Parliamentary Ad Hoc Select Committee on the Report of the South African Law Commission on Surrogate Motherhood *Draft Final Report* dated October 1998 at 41

The Committee's suggestions are most unsatisfactory as they leave the parties to decide the matter for themselves, and are in contradiction of the provisions of the *Choice on Termination of Pregnancy Act*.<sup>427</sup> This could lead to several undesirable consequences. For example, it is quite possible that the contract may permit the commissioning parents to insist that the surrogate mother undergo an abortion. It is submitted that the ultimate decision to undergo an abortion should be made by the surrogate mother, as she is the person who bears the risk of pregnancy, and is also the person who will undergo the physical procedure. The commissioning parents should not be able to insist that she has an abortion. Similarly, if the surrogate mother decides for any reason that she wishes to terminate the pregnancy, she should have the same rights as any other pregnant woman, in terms of the *Choice on Termination of Pregnancy Act*.<sup>428</sup> However, what will happen if the surrogate mother decides to terminate the pregnancy for non-therapeutic reasons? Although the commissioning parents may be able to claim either contractual or delictual damages, allowing these remedies will to some extent negate the surrogate mothers freedom of choice. Thus despite the commissioning parents' interest in the pregnancy, failure to respect the surrogate mother's wishes regarding the continuation or otherwise thereof, may constitute an unconscionable invasion of her personal freedom.

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<sup>427</sup> *Choice on Termination of Pregnancy Act* 92 of 1996

<sup>428</sup> *Choice on Termination of Pregnancy Act* 92 of 1996

## 5.6. Conclusion

It is submitted that the parties should be permitted recourse to either full or partial surrogacy. The advantages of full surrogacy are not sufficient to justify a complete ban on the use of partial surrogacy. Partial surrogacy is the cheaper, and less risky procedure, and will afford far more people access to surrogacy, an important consideration in a countries like South Africa, where resources are scarce.

The position of medical practitioners who assist in the surrogacy arrangement should be clarified. A situation such as that which exists in the United Kingdom, where medical and legal practitioners are afraid to render professional services with respect to a surrogacy arrangement, for fear that the receipt of a professional fee might result in criminal prosecution under the relevant Act, should be avoided at all costs.<sup>429</sup> The parties should be encouraged to seek the assistance of *bona fide* professionals and those professionals should be able to render services without fear of criminal sanction.

Any regulation of this stage of the arrangement should be careful not to dismiss the relationship between the surrogate mother and the foetus. 'A baby is not, after all, a matter of genes only. A great deal of its development in the foetal stage depends upon the maternal environment; upon the diet of the host-mother, the efficiency of her placenta, the biochemical details of her cells and bloodstream'.<sup>430</sup> A surrogate mother is more than just an incubator, and it is of great importance that her physical and

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<sup>429</sup> Section 2, *Surrogacy Arrangements Act* 1985

<sup>430</sup> George J Annas and Sherman Elias 'In Vitro Fertilization and Embryo Transfer: Medicolegal Aspects of a New Technique to Create a Family' (Summer 1983) 17(2) *Family Law Quarterly* 199 at 222

psychological integrity is protected. Although the commissioning parents have a strong interest in the birth of a healthy child, it is the writer's submission that they should be required to respect the surrogate mother's autonomy in matters relating to conduct during the pregnancy and abortion, as to permit interference would be an invasion of the surrogate mother's personal freedom.

## CHAPTER SIX

### DETERMINING PARENTHOOD

#### 6.1. Introduction

Until recently identifying a child's mother was as straightforward as identifying the birth mother. With the advent of new reproductive technologies, and in particular surrogate motherhood, this task has become more difficult. In the context of surrogacy, Corea isolates three possible mothers:-

- 1) The genetic mother who donates or sells her eggs;
- 2) the surrogate or natal mother who carries the baby; and
- 3) the social mother who raises the child.<sup>431</sup>

Clearly, existing definitions of motherhood, and indeed of parenthood, may no longer be satisfactory. The parental relationship is commonly based on the existence of a 'blood' tie between parent and child. Traditionally, a child's mother is the woman who gave birth to that child, irrespective of whether the child is illegitimate or not.<sup>432</sup> Giesen comments that the in most legal systems this was a given, and therefore no legal

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<sup>431</sup> Jo Bridgeman & Susan Millns *Feminist Perspectives on Law. Law's Engagement with the Female Body* (1998) 125

<sup>432</sup> The legal maxim, *mater certa semper est*, means simply that law identifies the mother of a child as the woman who gives birth to that child. The maxim is a statement of that which in the past has been always been certain. Diederika Pretorius *Surrogate Motherhood: A Worldwide View of the Issues* (1994) 134

definition of motherhood existed in family law.<sup>433</sup> Paternity has never been as certain and, consequently, the law has developed various methods of assigning fatherhood, drawing a distinction between legitimate and illegitimate children. In the case of a child born in marriage, there is a rebuttable presumption that the birth mother's husband is the father. Where a child is illegitimate, paternity must be established. The woman need only prove that she had sexual intercourse with the reputed father for the creation of a rebuttable presumption of paternity.<sup>434</sup>

Montgomery submits that in surrogacy arrangements, '[f]our different types of parental tie can be identified. The link between the gamete donors and the child is a genetic one ... The surrogate mother herself is bound to the child by the fact that she has carried and given birth to the child ... The surrogate mother's husband will be presumed to be the father under the presumption of legitimacy by reason of the marriage. The commissioning couple will be tied to the child by a social relationship, which corresponds to the outward appearance of a 'normal' family. They will be caring for the child'.<sup>435</sup> Thus, separation of the genetic, gestational and social components of parenthood entitles the gamete donors, the birth (or surrogate mother) and her husband and the commissioning parent or parents all to claim parenthood of the child.

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<sup>433</sup> Dieter Giesen 'Artificial Reproduction Revisited: Status Problems and Welfare of the Child - A Comparative View'. In Caroline Bridge (ed), *Family Law Towards the New Millenium: Essays for P M Bromley* (1997) 237

<sup>434</sup> P Q R Boberg *The Law of Persons and the Family* (1977) 326

<sup>435</sup> Jonathan Montgomery 'Constructing the Family - After a Surrogate Birth' (1986) 49(5) *Modern Law Review* 635 at 636

As use of reproductive technologies becomes more frequent, the inadequacy of maintaining a traditional view of the family unit becomes increasingly apparent. 'The changes made possible by reproductive technology ... challenge the fundamental assumption that human reproduction is the result of natural processes which inevitably define social relationships'.<sup>436</sup>

Deech comments that the traditional notion of family is disintegrating. 'First sex was separated from marriage more readily than before by revolutions in contraception and social attitudes in the 1960s. Support and marriage parted as women became more capable and willing as breadwinners. The rise in open cohabitation divided companionship and partnership from marriage in the 1970s and 1980s. In the same post-war decades childrearing was separated from marriage by the rise of acceptable illegitimacy and single parenting. Now childbearing has come apart from marriage and cohabitation by the processes of IVF. Most recently, fertilisation has become capable of being asexual by the newest cloning techniques'.<sup>437</sup> An alternative view recognises that families are 'collections of autonomous individuals who, like actors in the marketplace, choose to join together at various times and for various purposes'.<sup>438</sup> Despite the changes mentioned above, the law has been slow to adapt. Giesen comments that in the area of reproductive technologies, the law is '... lagging behind badly and sadly'.<sup>439</sup>

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<sup>436</sup> Janet L Dolgin 'The Law Debates the Family: Reproductive Transformations' (1995) 7(1) *Yale Journal of Law and Feminism* 37 at 42

<sup>437</sup> Ruth Deech 'Families and Fertility'. Unpublished paper delivered at the Ninth World Conference of the International Society of Family Law, Durban, South Africa, 28-31 July 1997 at 1

<sup>438</sup> Janet L Dolgin 'The Law Debates the Family: Reproductive Transformations' (1995) 7(1) *Yale Journal of Law and Feminism* 37 at 40

<sup>439</sup> Dieter Giesen 'Artificial Reproduction Revisited: Status Problems and Welfare of the Child - A Comparative View'. In Caroline Bridge *Family Law Towards the New Millenium: Essays for P M Bromley* (1997) 236

The South African courts have not yet been called upon to adjudicate parentage disputes in the context of surrogacy, but other jurisdictions have not been as fortunate. On occasion a surrogate mother has refused to surrender the child to the commissioning parents, despite her initial agreement to do so, and it is this possibility that has given rise to much debate - legal and otherwise - as to the nature of the parties' rights. Several theories have been advanced to provide solutions to the problem of determining parentage in the context of surrogacy arrangements. Some writers argue that the law of contract provides a solution to the problem of determining parentage, while others suggest that recourse should be had to existing principles of family law.

Proponents of a contractual approach argue that application of the law of contract to surrogacy arrangements has a number of advantages, in that it promotes certainty and recognises freedom of choice.<sup>440</sup> Epstein comments that lack of certainty with respect to parentage may result in drawn out litigation which should be avoided if at all possible.<sup>441</sup> It is not only the surrogate mother and the commissioning parents who will suffer in the event of a dispute as to parentage, but also the child who may spend the first few years of its life being passed back and forth between the parties. Thus, it is in the best interests of all concerned that those contractual provisions relating to parentage are enforceable.

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<sup>440</sup> Richard Epstein 'Surrogacy: The Case for Full Contractual Enforcement' (1995) 81 *Virginia Law Review* 2305 at 2339-2341

<sup>441</sup> Richard Epstein 'Surrogacy: The Case for Full Contractual Enforcement' (1995) 81 *Virginia Law Review* 2305 at 2340



Lack of certainty may have other less obvious consequences for the parties. For example, if the surrogate mother is allowed to entertain some hope of retaining the child, she is encouraged to develop maternal feelings.<sup>442</sup> In the case of the commissioning parents, fear of disappointment may discourage them from preparing themselves for the arrival of the child, which may make the transition to parenthood more difficult.

Another argument that favours the application of contract law to surrogate parenting is that it recognises the principle of individual autonomy or freedom of choice. The ways in which familial ties are formed have changed, and can no longer merely be presumed to follow a biological or genetic relationship. Applying contract law to the sphere of surrogacy acknowledges this. 'Contract reflects individual choice and recognises that 'families and familial relationships are not natural or inevitable but constructed and contingent'.<sup>443</sup> In other words, individuals should be permitted to enter agreements without fear of undue interference from the State.

It is by no means certain that contract law provides a solution to the problems of surrogate parenting. An agreement is only effective if the parties are able to enforce its terms. The validity or otherwise of the contract affects the availability of contractual remedies in the event of breach. Clearly, if the contract is found to be void or unenforceable, no contractual remedies are available.

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<sup>442</sup> Richard Epstein 'Surrogacy: The Case for Full Contractual Enforcement' (1995) 81 *Virginia Law Review* 2305 at 2339

Even where the contract is valid, application of contractual remedies may prove troublesome. The principal contractual remedies are specific performance and damages, and in the event of a breach of contract, an aggrieved party can claim either specific performance, damages or both.

The Court has a discretion to grant an order for specific performance of a contract.<sup>444</sup> Meyerson submits that in the context of a surrogacy arrangement, the Court should exercise its discretion in favour of the surrogate mother, and refuse an order to enforce the contract should the surrogate mother refuse to relinquish the child because of the bond that develops between them during pregnancy. She argues that it would be wrong to force the surrogate mother to give up her child as the physiological impact of pregnancy and childbirth cause changes to the woman's body. 'These changes are no respecter either of the genetic parentage of the child or of the woman's motivation. Surrogacy, especially full surrogacy, is a trick played on the body, and the body responds to the pregnancy in the normal way'.<sup>445</sup> Meyerson comments that the surrogate mother's body 'nourishes the child and makes possible every aspect of its development'.<sup>446</sup> Furthermore, the surrogate mother takes upon herself the physical risk

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<sup>443</sup> Janet L Dolgin 'The Law Debates the Family: Reproductive Transformations' (1995) 7 *Yale Journal of Law and Feminism* 37 at 41

<sup>444</sup> D Meyerson 'Surrogacy Agreements'. In Christina Murray (ed), *Gender and the New South African Legal Order* (1994) 139

<sup>445</sup> D Meyerson 'Surrogacy Agreements'. In Christina Murray (ed), *Gender and the New South African Legal Order* (1994) 140

<sup>446</sup> D Meyerson 'Surrogacy Agreements'. In Christina Murray (ed), *Gender and the New South African Legal Order* (1994) 140

of pregnancy.<sup>447</sup> Meyerson submits that these factors are sufficient to justify a refusal to order specific performance against the surrogate mother.<sup>448</sup>

It is doubtful whether an award of damages will adequately compensate the parties for their disappointment. It stands to reason that an award of damages will only be helpful where the offending party has the resources to meet such an award.

Many writers object to a contractual approach to surrogacy because it encourages an 'inappropriate way of thinking about family relations'.<sup>449</sup> They believe that the intrusion of the individualistic spirit of the marketplace into the realm of the family is undesirable as a currency should not be placed on certain things, 'such as one's politics, work, religion, family, love, sexuality, friendships, altruism, experiences, wisdom, moral commitments, character and personal attributes, all of which are integral to the self'.<sup>450</sup>

The established principles of family law may provide the appropriate tools in terms whereof the needs of all the parties, but especially those of the child, should be determined. Although, for the sake of certainty, it may appear to be a good idea for

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<sup>447</sup> D Meyerson 'Surrogacy Agreements'. In Christina Murray (ed), *Gender and the New South African Legal Order* (1994) 140

<sup>448</sup> D Meyerson 'Surrogacy Agreements'. In Christina Murray (ed), *Gender and the New South African Legal Order* (1994) 139-140

<sup>449</sup> Andrews explains that this objection is based on 'the sense that contract is an inappropriate way of thinking about family relations, a way which encourages people to behave badly toward each other'. Lori B Andrews 'Beyond Doctrinal Boundaries: A Legal Framework for Surrogate Motherhood' (1995) 81 *Virginia Law Review* 2343 at 2344 n 9

<sup>450</sup> Margaret Friedlander Brinig 'A Maternalistic Approach to Surrogacy: Comment on Richard Epstein's Surrogacy: The Case for Full Contractual Enforcement' (1995) 81 *Virginia Law Review* 2377 at 2380 n 11; See also M J Trebilcock *The Limits of Freedom of Contract* (1993)

parenthood to be decided in favour of the commissioning parents prior to birth, this may not always be in the child's best interests. Thus, the best interests of the child, and not the intention of the parties will determine parentage.

However, application of the principles of family law can, like contract, also be problematic. Western family law is based on the outmoded concept of the nuclear family, the male-led couple with children,<sup>451</sup> and in certain situations women fare poorly as a result of judicial bias against non-traditional families. Judicial bias has been demonstrated in the context of custody decisions 'purportedly decided by application of the best interest standard. It has been demonstrated that biases operate against (a) a sexually active mother, (b) against a mother with less money than the father, (c) against a working mother, (d) against a lesbian mother, (e) against a mother involved in an interracial marriage, and (f) in favour of a remarried father'.<sup>452</sup>

In *Baby M*,<sup>453</sup> the surrogate mother experienced a form of prejudice when contesting the commissioning father's right to claim custody of their daughter. The trial court judge condemned her as a bad mother because she agreed to participate in the surrogate arrangement, and as an hysterical woman when she attempted to keep her daughter. Her life was minutely examined, and the fact that she dyed her hair red, had been an exotic dancer, had remained in an abusive relationship with her husband, whom she divorced during the proceedings in order to marry the father of her youngest child

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<sup>451</sup> Lori B Andrews 'Beyond Doctrinal Boundaries: A Legal Framework for Surrogate Motherhood' (1995) 81 *Virginia Law Review* 2343 at 2345

<sup>452</sup> Lori B Andrews 'Beyond Doctrinal Boundaries: A Legal Framework for Surrogate Motherhood' (1995) 81 *Virginia Law Review* 2343 at 2344 n 5

<sup>453</sup> *In the Matter of Baby M* 525 A.2d 1128, 217 NJ Super. 313 (Superior Ct. Chancery Division 1987)

resulted in the media labelling her a 'baby seller'.<sup>454</sup> The trial court terminated her parental rights, and granted permanent custody to the commissioning father, declaring that 'the child's best interest is the only aspect of man's law that must be applied in fashioning a remedy for this contract'.<sup>455</sup>

To date, the courts faced with a custody dispute regarding surrogate parenting have generally refused to recognise the validity of these contracts, and have decided the issue of custody via recourse to the welfare principle.<sup>456</sup> For the most part these disputes have concerned partial surrogacy, where the surrogate mother is both the genetic and gestational mother. However, recent cases have seen the introduction of the intent principle, which effectively introduces a contractual approach to the assignment of parenthood.<sup>457</sup>

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<sup>454</sup> Ellen Faulkner 'The Case of Baby M' (1989) 3 *Canadian Journal of Women and Law* 239 at 240-242

<sup>455</sup> *In the Matter of Baby M* 525 A.2d 1128, 217 NJ Super. 313 (Superior Ct. Chancery Division 1987) 1166-67. Ellen Faulkner 'The Case of Baby M' (1989) 3 *Canadian Journal of Women and Law* 239 at 241

<sup>456</sup> In the United States, see *In the Matter of Baby M* 525 A.2d 1128, 217 NJ Super. 313 (Superior Ct. Chancery Division 1987); *In the Matter of Baby M* 537, A.2d 1227, 109 NJ 396 (NJ S. Ct. 1988). In the United Kingdom, see *A v C* [1985] F.L.R. 453; *Re C* [1985] F.L.R. 846; *Re P (Minors) (Surrogacy: Wardship)* [1987] 2 F.L.R. 421

<sup>457</sup> *Johnson v Calvert* 851 P 2d 766 (1993)

## 6.2. Comparative Perspective

### 6.2.1. United Kingdom:

For the purposes of the United Kingdom's *Human Fertilisation and Embryology Act*,<sup>458</sup> a mother is defined as 'the woman who is carrying or has carried a child as a result of the placing in her of an embryo or of sperm and eggs, and no other woman is to be treated as the mother of the child'.<sup>459</sup> Thus, the Act assigns motherhood to the gestational mother regardless of the child's genetic heritage.

Section 28 of the same Act defines a father, as the husband of the woman who has conceived by way of artificial fertilisation, if 'at the time of the placing in her of the embryo or the sperm and eggs or her artificial insemination, the woman was party to a marriage, and the creation of the embryo carried by her was not brought about with the sperm of the other party to the marriage, then, ... the other party to the marriage shall be treated as the father of the child unless it is shown that he did not consent to the placing in her of the sperm and eggs or to her insemination (as the case may be)'.<sup>460</sup> Where the woman is unmarried but seeks treatment together with a man, and 'the creation of the embryo carried by her was not brought about with the sperm of that man, then ... that man shall be treated as the father of the child'.<sup>461</sup>

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<sup>458</sup> *Human Fertilisation and Embryology Act* 1990

<sup>459</sup> Section 27(1), *Human Fertilisation and Embryology Act* 1990

<sup>460</sup> Section 28(2), *Human Fertilisation and Embryology Act* 1990

<sup>461</sup> Section 28(3), *Human Fertilisation and Embryology Act* 1990

These provisions imply that where a married surrogate mother seeks treatment, her husband will be regarded as the child's legal father, provided that he consented to the treatment. If an unmarried woman seeks treatment from a licensed centre accompanied by a man, then that man is regarded as the child's father, provided he is not the sperm donor. (A sperm donor will not be treated as a father, provided that his gametes are used in accordance with the Act).<sup>462</sup>

Diesen comments that the Act creates a class of children who are potentially fatherless.<sup>463</sup> For example, where a married woman is treated without the consent of her husband, the child is technically fatherless.<sup>464</sup> Other instances of fatherless children occur where an unmarried woman seeks treatment from a licensed centre unaccompanied by a man<sup>465</sup> or where she seeks treatment from a facility that is unlicensed.<sup>466</sup>

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<sup>462</sup> Section 28(6), *Human Fertilisation and Embryology Act 1990*

<sup>463</sup> Dieter Giesen 'Artificial Reproduction Revisited: Status Problems and Welfare of the Child - A Comparative View'. In Caroline Bridge (ed) *Family Law Towards the New Millenium: Essays for P M Bromley* (1997) 248

<sup>464</sup> Dieter Giesen 'Artificial Reproduction Revisited: Status Problems and Welfare of the Child - A Comparative View'. In Caroline Bridge (ed) *Family Law Towards the New Millenium: Essays for P M Bromley* (1997) 248

<sup>465</sup> Dieter Giesen 'Artificial Reproduction Revisited: Status Problems and Welfare of the Child - A Comparative View'. In Caroline Bridge (ed) *Family Law Towards the New Millenium: Essays for P M Bromley* (1997) 248

<sup>466</sup> Dieter Giesen 'Artificial Reproduction Revisited: Status Problems and Welfare of the Child - A Comparative View'. In Caroline Bridge (ed) *Family Law Towards the New Millenium: Essays for P M Bromley* (1997) 248

Section 30 of the *Human Fertilisation and Embryology Act* was drafted in response to the case of *Re W (Minors)(Surrogacy)*,<sup>467</sup> which highlighted the plight of commissioning parents in the context of full surrogacy. A local authority, the Cumbria County Council, insisted that the commissioning couple adopt the children despite the fact that they were the children's genetic parents. In terms of the law at that time, the commissioning parents had no legal right to the children, and therefore they were compelled to adopt the children.

The Act provides that in certain circumstances the commissioning parents may apply to court for an order declaring them to be the child's legal parents.<sup>468</sup> Section 30 makes it clear that so called 'fast track' adoption is only available where the following conditions have been met:<sup>469</sup>

- 1) The application can only be brought by married couples making use of assisted reproduction techniques,<sup>470</sup> and at least one of the intended parents is genetically related to the child;<sup>471</sup>
- 2) the child must have its home with the commissioning parents;<sup>472</sup>

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<sup>467</sup> Reported in *The Times*, 25 June 1990, and subsequently reported in *Re W (Minors) (Surrogacy)* [1991] 1 F.L.R. 385

<sup>468</sup> Section 30, *Human Fertilisation and Embryology Act* 1990

<sup>469</sup> Section 30(9) provides for a parental order to be drawn up by simplifying the existing adoption provisions contained in the *Adoption Act* 1976 (as amended) for England and Wales, and in Northern Ireland, the *Adoption (Northern Ireland) Order* 1987. Department of Health *Human Fertilisation and Embryology Act 1990. The Parental Orders (Human Fertilisation and Embryology) Regulations 1994, Guidance Notes* - England, Wales and Northern Ireland (August 1994 )1

<sup>470</sup> Section 30(1), *Human Fertilisation and Embryology Act* 1990

<sup>471</sup> Section 30(1)(a), *Human Fertilisation and Embryology Act* 1990

<sup>472</sup> Section 30(3), *Human Fertilisation and Embryology Act* 1990



- 3) the order must be made within six months of the child's birth;<sup>473</sup>
- 4) the court must be satisfied that the surrogate mother, and, if she is married, her husband 'have freely and with full understanding of what is involved, agreed unconditionally to the making of the order'.<sup>474</sup> However, consent to the transfer of parentage given within 6 weeks of the child's birth is ineffective;<sup>475</sup> and
- 5) the surrogate may not receive any payment, except for reasonable expenses or such payments authorised by the court.<sup>476</sup>

These orders are subject to the *Adoption Act*, which makes the child's welfare the paramount consideration of the court.<sup>477</sup> Section 6 of the *Adoption Act* requires that 'in reaching any decision relating to an application for a parental order a court shall have regard to all the circumstances, first consideration being given to the need to safeguard and promote the welfare of the child throughout his childhood'.<sup>478</sup>

The effect of a parental order is to extinguish the parental responsibility (guardianship) of the surrogate mother and her husband or partner. From the date of the court order, the commissioning parents are deemed to be the child's legal parents, and '... shall be

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<sup>473</sup> Section 30(2), *Human Fertilisation and Embryology Act* 1990

<sup>474</sup> Section 30(5), *Human Fertilisation and Embryology Act* 1990

<sup>475</sup> Section 30(6), *Human Fertilisation and Embryology Act* 1990

<sup>476</sup> Section 30(7), *Human Fertilisation and Embryology Act* 1990

<sup>477</sup> *Adoption Act* 1976

<sup>478</sup> Section 6, *Adoption Act* 1976

treated in law as if he had been born as a child of the marriage of the husband and wife'.<sup>479</sup>

Unfortunately, the Act is not all encompassing. It does not apply to those surrogacy arrangements, which do not comply with the requirements of the Act. For example, it is not applicable where the commissioning parents are unmarried, or are not genetically related to the child, and it does not provide a remedy to the surrogate mother, should the commissioning parents renege on their contractual duty to accept the child. The surrogate mother (and her husband or partner) are regarded as the child's legal parent, and the Act protects gamete donors from having parenthood thrust upon them, which may operate against the commissioning parents in the context of full surrogacy. It is therefore possible that the surrogate mother may have to assume responsibility for the child should the commissioning parents refuse to take the child. Conversely, if the surrogate mother refuses to relinquish the child, or if some other circumstance prevents compliance with the provisions of section 30, the commissioning parents are unable to apply for a parental order, and may apply to adopt the child, or have it declared a ward of court.<sup>480</sup>

In the United Kingdom, courts faced with a parentage dispute in the context of surrogacy arrangements, have awarded custody based on the best interests of the child. Montgomery comments that 'parental rights exist in order to promote the function of bringing up a child. The blood tie does not guarantee that this function will be well

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<sup>479</sup> Section 39(1)(a), Adoption Act 1976. See also para 2, *Parental Orders (Human Fertilisation and Embryology) Regulations* 1994

performed. English family law has moved on from making this assumption'.<sup>481</sup> Thus, in the *Baby Cotton* case,<sup>482</sup> prior to the enactment of section 30, the court found that the commissioning parents were in an excellent position to raise the child, and awarded custody to the couple. In addition the court held that as the surrogate mother had no wish to raise the child, it was clearly not in the child's best interests to be 'foisted upon a woman who did not want it if other suitable adults did'.<sup>483</sup>

However, in *A v C*,<sup>484</sup> application of the same principle resulted in the surrogate mother retaining custody. In this case the court felt that the bond between mother and child was such that it would be wrong to separate the two.<sup>485</sup>

In *Re P (Minors)(Wardship: Surrogacy)*,<sup>486</sup> the court found that the maternal bond between the surrogate mother and the children, as well as evidence that she was a satisfactory mother, outweighed the factors that the commissioning father was able to

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<sup>480</sup> Jo Bridgeman & Susan Millns *Feminist Perspectives on Law. Law's Engagement with the Female Body* (1998) 158

<sup>481</sup> J Montgomery 'Constructing a Family - After a Surrogate Birth' (1986) 49(5) *Modern Law Review* 635 at 638

<sup>482</sup> *Re C* [1985] F.L.R. 846

<sup>483</sup> J Montgomery 'Constructing a Family - After a Surrogate Birth' (1986) 49(5) *Modern Law Review* 635 at 637

<sup>484</sup> *A v C* (1985) F.L.R. 445

<sup>485</sup> Ormond J reasons that '[t]here is always a close physical bond between mother and child which tends to get closer from the time of birth onwards for some considerable time and then, perhaps, to slacken off a little as the child gets older. The bond between father and child operates in the opposite direction. At first it is very slight indeed, but gradually, association between father and child increases and lengthens in time, the bond becomes more and more real ... In this case we have a situation where there is no bond between the father and the child except the mere biological one'. J Montgomery 'Constructing a Family - After a Surrogate Birth' (1986) 49(5) *Modern Law Review* 635 at 637

<sup>486</sup> [1987] 2 F.L.R. 421

place before the court in support of his case. Accordingly, the Court awarded the care and custody of the children to the surrogate mother.

These cases demonstrate the tendency of the English courts to award custody to the birth mother (particularly where the child lives with the birth mother), and not to the commissioning father, notwithstanding the quality of parenting he is able to offer. In *Re P*, the court accepted that the commissioning father was able to offer the child many advantages. 'It is said (and said quite correctly), that the shape of the B family is the better shape of a family in which these children might be brought up, because it contains a father as well as a mother and that is undoubtedly true. Next, it is said that the material circumstances of the B family are such that they exhibit a far larger degree of affluence that can be demonstrated by Mrs P. That, also, is undoubtedly true. Next it is said that the intellectual quality of the environment of the B's home and the stimulus which would be afforded to these babies, if they were to grow up in that home, would be greater than the corresponding features in the home of Mrs P. That is not a matter which has been extensively investigated, but I suspect that is probably true. ... Then it is said that the religious comfort and support which the B's derive from their Church is greater than anything of that sort available to Mrs P. How far this is true, I simply do not know. ... Then it said, and there is something in this, that the problems which might arise from the circumstances that these children who are, of course, congenitally derived from the semen of Mr B and bear traces of Mr B's Asiatic origin would be more readily understood and discussed and reconciled in the household of Mr and Mrs B, a household with an Asiatic ethnic background than they would be if they arose in relation to those children while they were situated in the home of Mrs P, which is in an

English village and which has no non-English connections'.<sup>487</sup> Nevertheless, the Court decided that it was in the best interests of the children to stay with the woman who had given birth to them and who had shown a satisfactory standard of maternal care, despite the obvious advantages of awarding custody to the father.

These cases highlight the difficulty of applying the 'best interests' test. A tendency exists to equate the best interests of the child with maternal custody, and, consequently, the commissioning parents will almost always find it difficult to establish that it is in the child's best interests that they are awarded custody of a child.

### 6.2.2. United States of America

In the United States there is no uniform legislative approach to surrogacy arrangements, and there have been several disputes concerning parentage - the most notorious of these being the case of *Baby M*.<sup>488</sup>

In *Baby M*, the surrogate mother entered into a contract whereby she agreed to be artificially inseminated with the sperm of the commissioning father, to carry the child to term and to terminate her parental rights upon its birth. In return, she was to receive \$10 000. The arrangement proceeded smoothly until the baby was born, whereupon the

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<sup>487</sup> 1987] 2 F.L.R. 421 at 425-426. Jo Bridgeman & Susan Millns *Feminist Perspectives on Law. Law's Engagement with the Female Body* (1998) 158

<sup>488</sup> *In the Matter of Baby M* 525 A.2d 1128, 217 NJ Super. 313 (Superior Ct. Chancery Division 1987); *In the Matter of Baby M* 537, A.2d 1227, 109 NJ 396 (NJ S. Ct. 1988)

surrogate mother changed her mind, and she is quoted as saying, 'It overwhelmed me. I had no control. I had to keep her'.<sup>489</sup>

At the trial court,<sup>490</sup> the surrogacy contract was enforced against the surrogate mother. The Court held that the contract did not amount to the sale of a baby, as it was not possible for a father to buy something that already belonged to him. The court also found that it was in the child's best interests to be placed with her father. Consequently, the court upheld the contract, terminated the surrogate mother's parental rights, and allowed the commissioning mother to adopt the child.

The case was brought on appeal before the New Jersey Supreme Court.<sup>491</sup> Although, the court found that surrogate contracts were illegal and against public policy, it dealt with the contractual and custodial issues separately. The surrogate mother's parental rights were restored, but the commissioning father was given custody of the child on the grounds that it was in the child's best interests.

The case prompted many states to consider legislative intervention.<sup>492</sup> However, there is no uniformity, and state legislatures have adopted a variety of responses to the problem of determining parentage. For example, Arizona prohibits surrogacy contracts.

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<sup>489</sup> Alta R Charo 'United States: Surrogacy'. In Sheila A M Mclean (ed) *Law Reform and Human Reproduction* (1992) 234

<sup>490</sup> *In the Matter of Baby M*, 217 NJ Super. 313, 525 A.2d 1128 (Ch. Div 1987), *aff'd in part, rev'd in part*, *In the Matter of Baby M*, 109 N.J. 396, 537 A.2d 1227 (1988)

<sup>491</sup> *In the Matter of Baby M* 537, A.2d 1227, 109 NJ 396 (NJ S. Ct. 1988)

<sup>492</sup> See Diederika Pretorius *Surrogate Motherhood: A Worldwide View of the Issues* (1994) 55 for a general discussion

However, where there is such an arrangement, the surrogate mother is the child's legal mother and, if she is married, her husband is (rebuttably) presumed to be the father.<sup>493</sup> In Arkansas, the intended mother and the biological father are the legal parents, provided that the biological father is married to the intended mother. If the biological father is a sperm donor, then the commissioning mother is the legal parent.<sup>494</sup> In Washington, there are no presumptions with respect to parentage and it is for the court to decide who is to have custody of a child born of a surrogate arrangement.<sup>495</sup> In New Hampshire, the surrogate is deemed to be the mother and is allowed 72 hours after giving birth in which to decide whether she wishes to keep the child.<sup>496</sup>

In 1988, model legislation in the form of the *Uniform Status of Children of Assisted Conception Act* proposed that state legislation either prohibit the practice altogether or permit it only under the supervision of a court order.<sup>497</sup> Where a court has approved the arrangement prior to conception, the intended parents are regarded as the child's legal parents, but where a court has not given its approval the arrangement is void, and the

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<sup>493</sup> Ariz. Rev. Stat. Ann. 25-218 (1991). Alice Hofheimer 'Gestational Surrogacy: Unsettling State Parentage Law and Surrogacy Policy' (1992) 19(3) New York University Review of Law and Social Change 571 at 613. See also Diederika Pretorius *Surrogate Motherhood: A Worldwide View of the Issues* (1994) 55

<sup>494</sup> Ark. Code Ann 9-10-201 (Michie 1991). Alice Hofheimer 'Gestational Surrogacy: Unsettling State Parentage Law and Surrogacy Policy' (1992) 19(3) New York University Review of Law and Social Change 571 at 613. See also Diederika Pretorius *Surrogate Motherhood: A Worldwide View of the Issues* (1994) 55

<sup>495</sup> Wash. Rev. Code Ann 26.26.210-260 (West 1992). Alice Hofheimer 'Gestational Surrogacy: Unsettling State Parentage Law and Surrogacy Policy' (1992) 19(3) New York University Review of Law and Social Change 571 at 616. See also Diederika Pretorius *Surrogate Motherhood: A Worldwide View of the Issues* (1994) 56

<sup>496</sup> N.H. Rev. Stat. Ann 168-B:1-32 (1991). Alice Hofheimer 'Gestational Surrogacy: Unsettling State Parentage Law and Surrogacy Policy' (1992) 19(3) New York University Review of Law and Social Change 571 at 613. See also Diederika Pretorius *Surrogate Motherhood: A Worldwide View of the Issues* (1994) 56

<sup>497</sup> *Uniform Status of Children of Assisted Conception Act* 1988

surrogate mother is regarded as the child's mother. However, as model legislation is only advisory, state legislatures are by no means compelled to adopt the proposals.

In California, the case of *Johnson v Calvert*,<sup>498</sup> has created a remarkable precedent. The issue of parentage was decided by reference to procreative intent. The Court reasoned that the child owed its existence to the commissioning parents who had mentally conceived it, and accordingly awarded them parentage.

In terms of Californian law, both the surrogate and commissioning mother were able to provide evidence of their motherhood. Anna Johnson, the surrogate mother, had given birth to the child, whereas Crispina Calvert, the commissioning mother, was able to demonstrate her genetic relationship. The Court, however, recognised the procreative intent of the commissioning parents, and held that the intended mother was the child's legal mother. It reasoned that '[b]ecause two women each have presented acceptable proof of maternity, we do not believe this case can be decided without enquiring into the parties intentions as manifested in the surrogacy agreement ... [the Calverts) affirmatively intended the birth of the child, and took the necessary steps to effect in vitro fertilisation. But for their acted-on intention, the child would not exist ... Although the gestative function Anna [Johnson] performed was necessary to bring about the child's birth, it is safe to say Anna would not have been given the opportunity to gestate or deliver the child had she, prior to implantation of the zygote manifested

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<sup>498</sup> *Johnson v Calvert* 851 P 2d 766 (1993)



her own intent to be the child's mother'.<sup>499</sup> The Court regarded the role of the surrogate mother as that of a substitute: 'A woman who enters into a gestational surrogacy arrangement is not exercising her own right to make procreative choices; she is agreeing to provide a necessary and profoundly important service without any expectation that she will raise the resulting child as her own'.<sup>500</sup>

The decision is of great interest as it attempts to provide an answer to the question of who the natural mother is, without recourse to family law principles. The decision highlights the role of the commissioning parents in engineering the reproductive process. 'Although the Act recognises both genetic consanguinity and the act of giving birth as a means of establishing a mother and child relationship, when the two means do not coincide in one woman, she who intended to procreate the child - that is, she who intended to bring about the birth of a child that she intended to raise as her own - is the natural mother under California law'.<sup>501</sup> Thus, it is intention and not family law that is used to decide the competing claims of the parties.<sup>502</sup> Evidence of this intention will nearly always be found in the contract.

The court's reasoning in Johnson's case was used in *McDonald v McDonald* to decide the maternal status of a woman who, although not the genetic mother, had given birth

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<sup>499</sup> *Johnson v Calvert* 851 P 2d 766 (1993) at 782. D Morgan 'A Surrogacy Issue: Who is the Other Mother' (1994) 8 *International Journal of Law and the Family* 392 at 392

<sup>500</sup> *Johnson v Calvert* 851 P 2d 766 (1993) at 786. D Morgan 'A Surrogacy Issue: Who is the Other Mother' (1994) 8 *International Journal of Law and the Family* 392 at 394

<sup>501</sup> *Johnson v Calvert* 851 P 2d 766 (1993) at 782. D Morgan 'A Surrogacy Issue: Who is the Other Mother' (1994) 8 *International Journal of Law and the Family* 392 at 392

<sup>502</sup> D Morgan 'A Surrogacy Issue: Who is the Other Mother' (1994) 8 *International Journal of Law and the Family* 386 at 392

to twin girls.<sup>503</sup> In this case, the court relied on the notion of intent to find that the woman who mentally conceived the child was for all purposes its natural mother. The McDonalds were engaged in a custody dispute pending their divorce. Their children, had been conceived by means of artificial fertilisation of donated eggs. The embryos were successfully implanted and Mrs McDonald gave birth to twin girls. However, before the girls were born, Mr McDonald sought a divorce order in which he asked for the sole custody of the children. He based his claim on his genetic relationship arguing that he was the 'only genetic and natural parent available'.<sup>504</sup>

The Court relied heavily on the concept of maternal intent and found in Mrs McDonald's favour. It argued that in cases of split biological maternity the woman who mentally conceived the child (or children) is to be regarded in law as the natural mother.<sup>505</sup> It is, however, worth noting that the court's task was made easier by the fact that they were not asked to decide between the competing claims of two women.<sup>506</sup>

Dolgin discusses the doctrine of maternal intent in detail, and criticises the majority's reasoning in *Johnson's* case.<sup>507</sup> The word intent implies choice or will, whereas the traditional concept of family presupposes that the relationship is inevitable. Until

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<sup>503</sup> *McDonald v McDonald* 608 N.Y.S.2d 477 (App. Div. 1994)

<sup>504</sup> Janet L Dolgin 'The Law Debates the Family: Reproductive Transformations' (1995) 7(1) *Yale Journal of Law and Feminism*, 7(1) 37 at 59

<sup>505</sup> Janet L Dolgin 'The Law Debates the Family: Reproductive Transformations' (1995) 7(1) *Yale Journal of Law and Feminism*, 7(1) 37 at 61

<sup>506</sup> Janet L Dolgin 'The Law Debates the Family: Reproductive Transformations' (1995) 7(1) *Yale Journal of Law and Feminism*, 7(1) 37 at 62

<sup>507</sup> *Johnson v Calvert* 851 P 2d 766 (1993)

recently, posing the question - who is the child's mother - would be met with a reply that referred to the woman who gave birth to the child. Reproductive technologies allow the genetic and gestational components of motherhood to be split between two mothers. In effect both of these women can be called the real or natural mother. However, the majority refused to consider the possibility that a child could have more than one mother, and determined the identity of the 'natural' mother by referring to the pre-conception intention of the parties.

The dissenting judgement of Kennard J in the same case raises further concerns. In order to establish the intention of the parties, recourse must be had to the terms of their contract. Thus, an intent-based approach implies that contractual principles will decide the fate of the child concerned. Kennard J objects to the failure of the majority to decide the matter of custody by referring to the 'best interests' principle. He argues that 'we are not deciding a case involving the commission of a tort, the ownership of intellectual property, or the delivery of goods under a commercial contract; we are deciding the fate of a child'.<sup>508</sup> He argues that an intent-based test does not automatically serve a child's best interests. For example, it requires 'little imagination to foresee cases in which the genetic mother is unstable, or a substance abuser, or in which her life circumstances change dramatically during the gestational mother's pregnancy'.<sup>509</sup> An intent-based approach effectively extinguishes any claim that the surrogate mother might have to the child, even where it is clearly in the best interests of

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<sup>508</sup> D Morgan 'A Surrogacy Issue: Who is the Other Mother' (1994) 8 *International Journal of Law and the Family* 386 at 395

<sup>509</sup> D Morgan 'A Surrogacy Issue: Who is the Other Mother' (1994) 8 *International Journal of Law and the Family* 386 at 395-396

the child to remain with her.<sup>510</sup> Morgan comments that the majority could have achieved the same result by applying the principles of family law as the child was at that stage already three years old, and had its home with the commissioning parents. Accordingly, it would clearly have been in the child's best interests to remain with the commissioning parents.<sup>511</sup>

Thus, while a contractual approach is advantageous in that it 'respects the value of personal intention and contractual commitments in forming relationships',<sup>512</sup> it is not necessarily the most appropriate mechanism to determine parenthood. The best interests' test enables the court to decide which person or persons are best suited to the task of rearing the child, thereby placing weight on the social aspect of parenting.

### **6.2.3. Canada:**

In Canada, surrogacy contracts are likely to be void for reasons of public policy.<sup>513</sup> In addition, surrogacy contracts conflict with established principles of Canadian family law, as parentage and issues of custody are determined by reference to the best interests

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<sup>510</sup> D Morgan 'A Surrogacy Issue: Who is the Other Mother' (1994) 8 *International Journal of Law and the Family* 386 at 395-396

<sup>511</sup> D Morgan 'A Surrogacy Issue: Who is the Other Mother' (1994) 8 *International Journal of Law and the Family* 386 at 395-396

<sup>512</sup> Lori B Andrews 'Beyond Doctrinal boundaries: A Legal Framework for Surrogate Motherhood' (1995) 81 *Virginia Law Review* 2343 at 2345

<sup>513</sup> Law Reform Commission of Canada *Medically Assisted Procreation* (Working Paper: 65: 1992) 65-66

of the child.<sup>514</sup> Parental responsibilities are incapable of transfer as a matter of contract and it is illegal to agree to relinquish a child prior to its birth.<sup>515</sup>

While it is possible to enter a surrogacy arrangement in some Canadian provinces by exploiting the loopholes in existing law,<sup>516</sup> the practice is not always encouraged. Although, the Saskatchewan Law Commission on artificial insemination did not directly address surrogate motherhood,<sup>517</sup> its proposals provide that where a woman is artificially inseminated with the consent of her husband, the resultant child should be regarded as their legitimate child. A sperm donor is for all purposes deemed to have no legal ties with a child born as a result of artificial insemination. The implication is that in the case of surrogacy, the surrogate mother would be regarded as the legal mother, and her husband as the child's father. The genetic parent(s) in the case of full surrogacy, are deemed to have no ties to the child, and consequently are unable to rely on their genetic relationship to the child to assert their claim.<sup>518</sup>

In Alberta, legislators have proposed that the birth mother be regarded as the legal mother.<sup>519</sup> However, where the presumptions of parentage are not in accordance with reality, the proposed act allows a court to declare parentage, 'whether of the mother or

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<sup>514</sup> Law Reform Commission of Canada *Medically Assisted Procreation* (Working Paper: 65: 1992) 66

<sup>515</sup> Law Reform Commission of Canada *Medically Assisted Procreation* (Working Paper: 65: 1992) 66

<sup>516</sup> Law Reform Commission of Canada *Medically Assisted Procreation* (Working Paper: 65: 1992) 66

<sup>517</sup> Saskatchewan Law Reform Commission *Proposals for a Human Artificial Insemination Act* (March 1987)

<sup>518</sup> South African Law Commission *Report on Surrogate Motherhood* (Project 65, 1993) 59

<sup>519</sup> Alberta Law Reform Institute *Status of Children: Revised Report* (Report No. 60, March 1991)

the father - of a child who is the product of assisted human reproduction'.<sup>520</sup> The court must issue a declaration if it is satisfied on a balance of probabilities that the applicant is in fact the parent. The best interests of the child are paramount and the applicant must be able and willing to assume the responsibilities of parenting. When the court makes the declaration, it will make an order with regard to guardianship and access.

The province of Ontario undertook extensive research into surrogate arrangements, and its proposals created some controversy as they are facilitative of such arrangements.<sup>521</sup> <sup>522</sup> The commission proposed that surrogate contracts are enforceable provided that the contract is in accordance with legislative provisions.<sup>523</sup> In order to ensure that surrogate contracts complied with the prescribed criteria, it proposed that the courts take an active role in this regard.<sup>524</sup>

The Ontario Commission recommended that from the moment of birth the commissioning parents be considered for all purposes to be the legal parents of the child, with all the ensuing responsibilities and duties of parentage.<sup>525</sup> In the event that the child is born handicapped, the commissioning parents are nevertheless accorded

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<sup>520</sup> South African Law Commission *Report on Surrogate Motherhood* (Project 65, 1993) 59

<sup>521</sup> Ontario Law Reform Commission *Report on Human Artificial Reproduction and Related Matters* (1985)

<sup>522</sup> The South African Law Commission discusses the recommendations of the Ontario Commission in some detail. South African Law Commission *Report on Surrogate Motherhood* (Project 65, 1993) 50-58

<sup>523</sup> Bernard Dickens 'Canada: The Ontario Law Reform Commission Project on Human Artificial Reproduction'. In Sheila A M Mclean (ed) *Law Reform and Human Reproduction* (1992) 47 at 71

<sup>524</sup> Bernard Dickens 'Canada: The Ontario Law Reform Commission Project on Human Artificial Reproduction'. In Sheila A M Mclean (ed) *Law Reform and Human Reproduction* (1992) 47 at 71

<sup>525</sup> Bernard Dickens 'Canada: The Ontario Law Reform Commission Project on Human Artificial Reproduction'. In Sheila A M Mclean (ed) *Law Reform and Human Reproduction* (1992) 47 at 72

full parental status and should they refuse to take on that responsibility they can be compelled to provide financial support.<sup>526</sup> Furthermore, it recommended that legislation should provide for the immediate surrender of the child at birth, and should the mother refuse to hand over the child, a court order compelling her to do so could be obtained by the commissioning parents.<sup>527</sup>

The Law Reform Commission of Canada recommended that surrogate contracts be regarded as void and, consequently, unenforceable.<sup>528</sup> It reasoned that the law of contract is not an appropriate medium to decide matters relating to the family. The removal of surrogate agreements from the sphere of contract would enable a court to decide issues such as custody and legal parentage by reference to the best interests of the child.<sup>529</sup>

The Law Reform Commission of Canada noted that the presumption that the woman who gives birth to a child is its mother, is a rule of evidence, and is capable of rebuttal.<sup>530</sup> Where a number of persons are able to claim parentage, it is possible that a dispute will arise on this point. The Commission recommends that the surrogacy

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<sup>526</sup> Bernard Dickens 'Canada: The Ontario Law Reform Commission Project on Human Artificial Reproduction'. In Sheila A M Mclean (ed) *Law Reform and Human Reproduction* (1992) 47 at 73

<sup>527</sup> Bernard Dickens 'Canada: The Ontario Law Reform Commission Project on Human Artificial Reproduction'. In Sheila A M Mclean (ed) *Law Reform and Human Reproduction* (1992) 47 at 72

<sup>528</sup> Law Reform Commission of Canada *Medically Assisted Procreation* (Working Paper: 65: 1992) 138

<sup>529</sup> Law Reform Commission of Canada *Medically Assisted Procreation* (Working Paper: 65: 1992) 66

<sup>530</sup> Law Reform Commission of Canada *Medically Assisted Procreation* (Working Paper: 65: 1992) 71-72

contract be null and void, and custody of the child is to be determined according to the best in interests of the child'.<sup>531</sup>

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<sup>531</sup> Law Reform Commission of Canada *Medically Assisted Procreation* (Working Paper: 65: 1992) 134-135



### 6.3. Determining Parenthood: South Africa

In South Africa, traditional family law identifies the woman who bears a child as its mother.<sup>532</sup> In the past this fact has been so obvious that there has been no need for any discussion of the notion of motherhood. In contrast, paternity is often the subject of dispute. In order to identify the father of a child, the law distinguishes between legitimate and illegitimate children. Where a child is born of a marriage, the birth mother's husband is rebuttably presumed to be its father. Where a child is illegitimate, the birth mother is its sole legal guardian, and paternity must be established.

The *Children's Status Act*, *inter alia*, regulates the status of children conceived by means of artificial fertilisation.<sup>533</sup> In terms of the Act, artificial fertilisation includes both the introduction of 'by other than natural means of a male gamete or gametes into the internal reproductive organs of that woman', and 'the placing of the product of a union of male and a female gamete or gametes which have been brought together outside the human body in the womb of that woman'.<sup>534</sup> This definition would appear to be wide enough to include the artificial fertilisation techniques utilised to effect conception in a surrogacy arrangement.

The Act provides that 'whenever the gamete or gametes of any person other than a married woman or her husband have been used with the consent of both that woman and her husband for the artificial insemination of that woman, any child born of that

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<sup>532</sup> The common law presumption is expressed in the maxim *mater semper certa est*, which means literally that the identity of the mother is always certain.

<sup>533</sup> *Children's Status Act* 82 of 1987

<sup>534</sup> Section 5(3)(a) & (b), *Children's Status Act* 82 of 1987

woman as a result of such artificial insemination shall for all purposes be deemed to be the legitimate child of that woman and her husband as if the gamete or gametes of that woman or her husband were used for such artificial insemination'.<sup>535</sup> Furthermore, no right, duty or obligation shall arise between any child born as a result of the artificial insemination and the gamete donor or donors, unless the donor is the birth mother or her husband.<sup>536</sup>

These provisions have a restrictive effect. The surrogate mother and her husband are deemed to be the child's legal parents. Thus, the commissioning couple would have to adopt the child in order to become its legal parents and this depends on the co-operation of the surrogate mother and her husband.<sup>537</sup> Likewise, should the commissioning parents decide that they no longer wish to take the child, the surrogate mother may be burdened with a child she never bargained for.

Presently, the commissioning couple have few options available to them to ensure their recognition as the legal parents of a child born of a surrogate arrangement. In terms of the provisions of the *Child Care Act*,<sup>538</sup> they are able to adopt the child with the consent of the surrogate mother (and her husband if she is married).<sup>539</sup> It is also (theoretically) possible for the couple to apply to the High Court for an order requesting that

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<sup>535</sup> Section 5(1)(a), *Children's Status Act* 82 of 1987

<sup>536</sup> Section 5(2), *Children's Status Act* 82 of 1987

<sup>537</sup> In terms of the *Child Care Act* 74 of 1983, the surrogate mother (and, if she is married, her husband) must consent to the adoption of the child. Second Issue Paper on The Review of the *Child Care Act*: Project 110 at 3

<sup>538</sup> *Child Care Act* 74 of 1983

<sup>539</sup> Sections 17-18, *Child Care Act* 74 of 1983

guardianship of the minor child be awarded to them.<sup>540</sup> In this instance, they would have to show that such an order would be in the best interests of the minor child.

The South African Law Commission proposes that only gestational surrogacy is permitted.<sup>541</sup> The Commission reasons that if the surrogate mother is genetically related to the child, almost no justification can be found to compel her to relinquish the child.<sup>542</sup> Departing from the common law, the Commission proposes that the commissioning parents be regarded as the child's legal parents.<sup>543</sup> The proposed bill provides that 'any child born as a result of the artificial fertilisation of the surrogate mother shall for all purposes be the child of the commissioning parents as if the commissioning wife had given birth to the child within her marriage to the commissioning husband'.<sup>544</sup> The surrogate mother is obliged to surrender the child to the commissioning parents as soon as is reasonably possible after the birth.<sup>545</sup> The surrogate mother and her husband will have no rights of parenthood or custody of or access to the child.<sup>546</sup>

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<sup>540</sup> Second Issue Paper on The Review of the *Child Care Act*: Project 110 at 3

<sup>541</sup> South African Law Commission *Report on Surrogate Motherhood* (Project 65, 1993) 152

<sup>542</sup> South African Law Commission *Report on Surrogate Motherhood* (Project 65, 1993) 154

<sup>543</sup> Clause 8(1)(a), Schedule A to the South African Law Commission *Report on Surrogate Motherhood* (Project 65, 1993)

<sup>544</sup> Clause 8(1)(a), Schedule A to the South African Law Commission *Report on Surrogate Motherhood* (Project 65, 1993)

<sup>545</sup> Clause 8(1)(b), Schedule A to the South African Law Commission *Report on Surrogate Motherhood* (Project 65, 1993)

<sup>546</sup> Clause 8(1)(c), Schedule A to the South African Law Commission *Report on Surrogate Motherhood* (Project 65, 1993)

The corollary to this is that the surrogate mother will never be forced to assume responsibility for the child. Once conception has taken place, the commissioning parents are unable to renege on the arrangement even where they no longer wish to parent the child. The Commission explains that 'from a legal viewpoint the child is automatically deemed to be the legal child of the commissioning parents. This entails that it is registered as the legal child of the couple at birth. The parents are obliged to care for the child even where it is born handicapped'.<sup>547</sup>

The Commission proposes further that the surrogate mother be obliged to hand over the child to the commissioning parents as soon as is reasonably possible after its birth,<sup>548</sup> and that neither the surrogate mother nor her husband shall have any rights of access to or custody of the child.<sup>549</sup> The child has no claim of maintenance or succession against the surrogate, her husband or their relatives.<sup>550</sup>

The Commission proposes a system of direct parentage, in other words, there is no need for the commissioning parents to apply for a transfer of parentage, as the child is automatically deemed to be the legal child of the commissioning parents, and is

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<sup>547</sup> Clause 8 (1)(a), Schedule A to the South African Law Commission *Report on Surrogate Motherhood* (Project 65, 1993)

<sup>548</sup> Clause 8(1)(b), Schedule A to the South African Law Commission *Report on Surrogate Motherhood* (Project 65, 1993)

<sup>549</sup> Clause 8(1)(c), Schedule A to the South African Law Commission *Report on Surrogate Motherhood* (Project 65, 1993)

<sup>550</sup> Clause 8(1)(e), Schedule A to the South African Law Commission *Report on Surrogate Motherhood* (Project 65, 1993)

registered at birth as the legal child of the commissioning couple.<sup>551</sup> Consequently, neither the surrogate mother, nor her husband, has any rights or duties to the child.<sup>552</sup>

The Commission emphasises that once the child is conceived no attempt on the part of any of the parties to renege on the agreement (with the exception of the circumstances relating to abortion), will be countenanced.<sup>553</sup> The Commission states that it is of cardinal importance that the best interests of the child are considered before conception. Situations where the court has to decide these issues *ex post facto* should be prevented at all costs.<sup>554</sup>

Finally, the Commission proposes that where the parties fail to comply with the provisions of the proposed act, any agreement, which may exist between them, is invalid, and the surrogate mother is deemed to be the legal mother.<sup>555</sup> The purpose of this clause is to encourage the parties to comply with the existing agreement.<sup>556</sup>

While the Commission does not explicitly state its reasons for adopting a direct parentage model, it appears that it was persuaded by the following considerations:

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<sup>551</sup> South African Law Commission *Report on Surrogate Motherhood* (Project 65, 1993) 173

<sup>552</sup> South African Law Commission *Report on Surrogate Motherhood* (Project 65, 1993) 174

<sup>553</sup> South African Law Commission *Report on Surrogate Motherhood* (Project 65, 1993) 174

<sup>554</sup> South African Law Commission *Report on Surrogate Motherhood* (Project 65, 1993) 156

<sup>555</sup> Clause 8(2), Schedule A to the South African Law Commission *Report on Surrogate Motherhood* (Project 65, 1993)

<sup>556</sup> South African Law Commission *Report on Surrogate Motherhood* (Project 65, 1993) 174

- 1) That it is in the best interests of the child for parenthood to be decided prior to its birth;<sup>557</sup>
- 2) the existence of a genetic relationship between the commissioning couple and their child facilitates bonding between the commissioning parents and the child;<sup>558</sup>
- 3) the lack of a genetic relationship between the surrogate and the child will make it easier for the surrogate to relinquish the child, as it is thought that bonding occurs after birth;<sup>559</sup> and
- 4) a direct parentage model gives effect to the parties' intentions as stated in the agreement.

It is arguable whether it is in the child's best interests to assign parenthood prior to birth. Despite the Commission's view that a surrogate is less likely to want to renege on an agreement where she is not genetically related to the child, there is evidence that the maternal attachment experienced by these mothers is as great as if they were genetically related to the child.<sup>560</sup> The surrogate carries, nurtures and ultimately gives birth to the child, and it appears arbitrary to discount her biological contribution in favour of the genetic contribution of the commissioning parents.

The Parliamentary Ad Hoc Select Committee on the Report of the South African Law Commission on Surrogate Motherhood has alternative proposals to those of the

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<sup>557</sup> South African Law Commission *Report on Surrogate Motherhood* (Project 65, 1993) 156

<sup>558</sup> South African Law Commission *Report on Surrogate Motherhood* (Project 65, 1993) 151

<sup>559</sup> South African Law Commission *Report on Surrogate Motherhood* (Project 65, 1993) 152

<sup>560</sup> *Debates of the National Assembly (Hansard)* Wednesday 18 June 1997 col 4056

Commission with respect to the assignment of parenthood.<sup>561</sup> It distinguishes between full and partial surrogacy, and introduces the concepts of direct parentage and fast track adoption. Where full surrogacy is utilised, the child is considered the legitimate child of the commissioning parents at birth, and the birth is registered accordingly.<sup>562</sup> Although the parties can enter into an agreement as to any rights of access the surrogate mother is to enjoy, neither she nor any of her relatives have any rights of parenthood or custody of the child.<sup>563</sup> Nor does the child have any rights of maintenance or of succession against the birth mother or any of her relatives.<sup>564</sup> The surrogate is obliged to hand the child to the commissioning parents immediately after birth.<sup>565</sup>

In the case of partial surrogacy, the Committee recommends fast track adoption,<sup>566</sup> which it defines as, 'a procedure whereby the commissioning parent or parents in a surrogate motherhood agreement petition the court for a parental order whereby they will be treated in law as the parent or parents of the child or children, without having to adopt the said child or children. Until the making of the order by the court the surrogate

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<sup>561</sup> para 6.9.1.1, Parliamentary Ad Hoc Select Committee on the Report of the South African Law Commission on Surrogate Motherhood *Draft Final Report* dated October 1998 at 42

<sup>562</sup> para 3.11, Parliamentary Ad Hoc Select Committee on the Report of the South African Law Commission on Surrogate Motherhood *Draft Final Report* dated October 1998 at 7

<sup>563</sup> para 6.9.1.3, Parliamentary Ad Hoc Select Committee on the Report of the South African Law Commission on Surrogate Motherhood *Draft Final Report* dated October 1998 at 43

<sup>564</sup> para 6.9.1.4, Parliamentary Ad Hoc Select Committee on the Report of the South African Law Commission on Surrogate Motherhood *Draft Final Report* dated October 1998 at 43

<sup>565</sup> para 6.9.1.5, Parliamentary Ad Hoc Select Committee on the Report of the South African Law Commission on Surrogate Motherhood *Draft Final Report* dated October 1998 at 43

<sup>566</sup> para 6.9.2.4, Parliamentary Ad Hoc Select Committee on the Report of the South African Law Commission on Surrogate Motherhood *Draft Final Report* dated October 1998 at 43

mother remains the legal mother of the child or the children'.<sup>567</sup> In other words, the child is registered in the name of the surrogate mother and is regarded as her child (and that of her husband, if applicable). The commissioning parents may apply to the court for an order directing a transfer of parentage within six months of the child's birth but the application may not be brought before a six-week period has elapsed from the date of birth. The surrogate mother's consent must be unconditional, and can not be given within the six-week period after the child's birth. Of note is the Committee's recommendation that the surrogate mother is obliged to hand over the child to the commissioning parents at birth.<sup>568</sup>

Clearly, the Committee has drawn heavily on the provisions contained in section 30 of the *Human Fertilisation and Embryology Act*,<sup>569</sup> which enables a court to make an order providing for a child to be treated in law as the child of the commissioning parents, provided certain criteria are complied with. As already mentioned, a section 30 order is restricted to married couples making use of assisted reproduction techniques where at least one of the intended parents is genetically related to the child.<sup>570 571</sup> The order must be brought within six months of the child's birth,<sup>572</sup> and the child must have

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<sup>567</sup>para 3.11, Parliamentary Ad Hoc Select Committee on the Report of the South African Law Commission on Surrogate Motherhood *Draft Final Report* dated October 1998 at 7

<sup>568</sup> para 6.9.2.3, Parliamentary Ad Hoc Select Committee on the Report of the South African Law Commission on Surrogate Motherhood *Draft Final Report* dated October 1998 at 7

<sup>569</sup> *Human Fertilisation and Embryology Act* 1990

<sup>570</sup> Section 30(1), *Human Fertilisation and Embryology Act* 1990

<sup>571</sup> Section 30(1)(a) & (b), *Human Fertilisation and Embryology Act* 1990

<sup>572</sup> Section 30(2), *Human Fertilisation and Embryology Act* 1990



its home with the commissioning parents.<sup>573</sup> In addition, the court must be satisfied that the surrogate and, if she is married, her husband 'have freely and with full understanding of what is involved, agreed unconditionally to the making of the order', and the surrogate mother can not give her consent before a period of six weeks elapses.<sup>574</sup>

The 'best interests' principle is the court's paramount consideration in deciding to grant a section 30 order. A guardian *ad litem* is appointed to assist the court in establishing whether or not the requirements set out in section 30 have been satisfied,<sup>575</sup> and whether reasons exist to refuse a parental order. In English law parenthood is separated from permission to raise a child, and parental responsibility is not automatically accorded to the legal parents.<sup>576</sup> Giesen comments that English law considers 'nurture' more important than 'nature', and concludes that this is advantageous as emphasis is placed on the socially defined family, and not the biological family.<sup>577</sup> In other words, the best interests of the child trump biological and genetic parenthood.

The Parliamentary Ad Hoc Select Committee proposes that the surrogate mother is legally incapable of consenting to the transfer of parentage to the commissioning parents within six weeks of giving birth, despite the fact that in terms of the

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<sup>573</sup> Section 30(3)(a), *Human Fertilisation and Embryology Act 1990*

<sup>574</sup> Section 30(5), *Human Fertilisation and Embryology Act 1990*

<sup>575</sup> Section 41, *Children Act 1989*

<sup>576</sup> Dieter Giesen 'Artificial Reproduction Revisited: Status Problems and Welfare of the Child - A Comparative View'. In Caroline Bridge (ed), *Family Law Towards the New Millenium: Essays for P M Bromley* (1997) 259

<sup>577</sup> Dieter Giesen 'Artificial Reproduction Revisited: Status Problems and Welfare of the Child - A Comparative View'. In Caroline Bridge (ed), *Family Law Towards the New Millenium: Essays for P M Bromley* (1997) 259

Committees own recommendations, the child will already be living with them. The commissioning parents have six months in which to bring an application for the transfer of parental rights, but this application will not succeed unless the surrogate mother has consented to the transfer. The Committee makes no mention of the need for the consent of the surrogate mother's husband, although in terms of the *Children's Status Act* he is the child's legal father.<sup>578</sup> Just as in English law, the Committee also provides for the appointment of a guardian *ad litem* for the child.<sup>579</sup> However, in English law, this guardian is appointed in terms of the Adoption Act, and has specific powers and responsibilities in terms of that Act.<sup>580</sup> The closest South African law comes to the English concept of a guardian *ad litem* is the Family Advocate. However, it is debatable whether the Family Advocate has the resources to perform yet another function in family law arena, and in any event the Committee does not suggest who or which body will fulfil this role.

The effect of an order to transfer parentage is that the surrogate mother's parental rights are extinguished, although the parties can come to an agreement to afford the surrogate mother access rights.<sup>581</sup> Furthermore, the child has no claim for maintenance or succession against the surrogate mother or any of her relatives.<sup>582</sup> The Committee makes no mention of the surrogate mother's husband. As he is the child's legal father,

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<sup>578</sup> Section 5, *Children's Status Act* 82 of 1987

<sup>579</sup> para 6.9.2.2, Parliamentary Ad Hoc Select Committee on the Report of the South African Law Commission on Surrogate Motherhood *Draft Final Report* dated October 1998 at 43

<sup>580</sup> *Adoption Act*, 1976

<sup>581</sup> para 6.9.2.6, Parliamentary Ad Hoc Select Committee on the Report of the South African Law Commission on Surrogate Motherhood *Draft Final Report* dated October 1998 at 44

<sup>582</sup> para 6.9.2.7, Parliamentary Ad Hoc Select Committee on the Report of the South African Law Commission on Surrogate Motherhood *Draft Final Report* dated October 1998 at 44

provision should be made to provide for the extinction of his parental rights. Once the parental order has been granted, the child will be issued with a new birth certificate, naming the commissioning parents as the child's parents.<sup>583</sup>

The Committee recommends that the child is handed to the commissioning parents at birth in the case of both full and partial surrogacy.<sup>584</sup> <sup>585</sup> The surrender of the child raises a number of issues, for example, what remedies are available to the commissioning parents, should the surrogate mother refuse to hand over the child? The Committee states that the surrogate mother is obliged to hand the child to commissioning parents at birth, but does not state how far the commissioning parents can go to compel the surrogate mother to surrender the child. In the case of full surrogacy, the commissioning parents are in strong position as they are deemed to be the child's legal parents, and it does not appear that the surrogate has any claim to the child. In the case of partial surrogacy, the commissioning parents have no remedy should the surrogate mother decide not to relinquish the child.

In addition, the Committee omits to discuss the situation where the commissioning parents breach the agreement, for example, by refusing to accept the child because it is born handicapped. As previously discussed, the position of the South African Law Commission is that after conception the parties are not permitted to renege, and the commissioning parents are deemed to be the child's parents. In effect the parties are not

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<sup>583</sup> para 6.9.2.4, Parliamentary Ad Hoc Select Committee on the Report of the South African Law Commission on Surrogate Motherhood *Draft Final Report* dated October 1998 at 43

<sup>584</sup> para 6.9.1.2, Parliamentary Ad Hoc Select Committee on the Report of the South African Law Commission on Surrogate Motherhood *Draft Final Report* dated October 1998 at 42

<sup>585</sup> para 6.9.2.3, Parliamentary Ad Hoc Select Committee on the Report of the South African Law Commission on Surrogate Motherhood *Draft Final Report* dated October 1998 at 43

allowed to change their minds, regardless of any defects the child may suffer from. In this regard, the Committee's recommendations are the same.

However, the Committee also permits partial surrogacy, and as discussed above the surrogate mother is regarded as the child's legal mother. Although the surrogate mother is given an opportunity to decide whether to consent to the transfer of parentage, no provision is made for the situation where the commissioning parents no longer wish to take the child. The question arises whether the surrogate mother should be able to compel the commissioning parents to assume responsibility for the child?

The issue of breach of contract on the part of the commissioning parents is likely to arise when the child is born with a physical or mental defect. The case of *Malahoff v Stiver*,<sup>586</sup> illustrates the difficulties encountered when a child born of a surrogacy agreement is handicapped. The baby in this case was born with microcephaly. Neither the surrogate mother, her husband or the commissioning parents wanted the child. It was eventually established through blood tests, that the surrogate's husband was the child's father, thereby releasing the commissioning father from his obligations. Giesen comments that in these situations, 'the step to demand flawless delivery is easily taken. The obligation necessarily connected with 'natural' reproduction to accepting the resulting child, whatever its physical and mental state may be, ceases to be the central norm of the parent-child relationship'.<sup>587</sup>

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<sup>586</sup> *Malahoff v Stiver* No. 83-4734

<sup>587</sup> Dieter Giesen 'Artificial Reproduction Revisited: Status Problems and Welfare of the Child - A Comparative View'. In Caroline Bridge (ed), *Family Law Towards the New Millenium: Essays for P M Bromley* (1997) 239

Although it is possible to argue that it is not in a child's best interest to be placed with parents who do not want it, it is submitted that the surrogate mother should be able to compel the commissioning parents to take responsibility for the child. However, it can be argued that it is unfair to hold the commissioning parents to the contract, while permitting the surrogate to refuse to hand over the child. Meyerson submits that it should be possible to compel the commissioning parents to perform because a handicapped child is a risk of any pregnancy. The commissioning parents would bear the risk in the case of a normal pregnancy, and consequently it is reasonable to expect them to bear the risk now.<sup>588</sup>

Meyerson argues that it should not be possible to compel the surrogate mother to surrender the child. 'Carrying and giving birth to a child almost invariably has a deep emotional impact on a woman, whether she is genetically related to it or not, and whatever her motives for conceiving it'.<sup>589</sup> For this reason it is submitted that the distinction made between full and partial surrogacy is illogical. Afterall, why should the experience of conceiving a child, and carrying it to term, have less impact on a surrogate mother in a full surrogacy arrangement than in a partial surrogacy arrangement.

#### 6.4. Conclusion:

Different jurisdictions have adopted disparate solutions to the problem of assigning parenthood in the context of surrogacy arrangements. In *Johnson v Calvert*, a

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<sup>588</sup> D Meyerson 'Surrogacy Agreements'. In Christina Murray (ed), *Gender and the New South African Legal Order* (1994) 142

<sup>589</sup> D Meyerson 'Surrogacy Agreements'. In Christina Murray (ed), *Gender and the New South African Legal Order* (1994) 140

Californian court identified the mother by recourse to the intention of the parties.<sup>590</sup> This can be criticised for importing contractual principles into an area of the law in which the interests of the child should be paramount. Moreover, such an approach creates a class of women whose role is that of a human incubator. In this role, 'women ... [are] planted with the male seeds and harvested; women [are] used for the fruit that they bear, like trees; women who run the gamut from prized cows to mangy dogs; from highbred horses to sad beasts of burden'.<sup>591</sup>

In other jurisdictions, the law clings to the more traditional definitions of motherhood, which poses the question of how to decide between the genetic and gestational mother. An award of parenthood on the basis of genetic relationship ignores the role that the surrogate mother plays in carrying the child to term and giving birth. On the other hand, emphasis on the gestational element of motherhood, ignores the genetic relationship the commissioning parents have with the child, and their willingness to undertake the responsibilities of parenthood.

The South African Law Commission's proposal that the commissioning parents will be deemed to be the child's legal parents, has the advantage of certainty. In addition, the lengths to which the commissioning parents are prepared to go to have a child of their own is seen as indicative of their commitment,<sup>592</sup> thereby assuming that the best interests of the child will always be served by awarding parentage to them. However, it is submitted that this assumption is too easily made, as numerous other factors could,

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<sup>590</sup> *Johnson v Calvert* 851 P 2d 766 (1993)

<sup>591</sup> Jo Bridgeman & Susan Millns *Feminist Perspectives on Law. Law's Engagement with the Female Body* (1998) 175

<sup>592</sup> South African Law Commission *Report on Surrogate Motherhood* (Project 65: 1993) 18

and should, be taken into account in determining the best interests. The Commission appears to place too great an emphasis on intention, and the genetic relationship between commissioning parents and child, at the expense of the contribution of the surrogate mother in carrying the child to term.

It is submitted that the Commission has erred in prohibiting partial surrogacy. As previously discussed, the restriction placed on partial surrogacy is unnecessary, and consequently both full and partial surrogacy should be permitted. Likewise, the Parliamentary Ad Hoc Select Committee's proposal that there be two different models to assign parenthood, distinguishing between full and partial surrogacy, is unnecessary. It is submitted that the surrogate mother (and where applicable, her husband) should be deemed to be the child's legal parent (or parents), regardless of the child's genetic heritage. The intention of the parties should be recognised by making provision for a speedy procedural mechanism to transfer parentage to the commissioning parents. The commissioning parents should not be able to force the surrogate mother to relinquish the child. Although this may at first seem unfair, the surrogate mother has carried the child to term, and has had the opportunity to bond with the child.

However, to some extent the interests of the commissioning parents can be protected by requiring the surrogate mother to elect whether or not to keep the child within a limited time. In contrast, the Committee permits the surrogate mother a relatively long period to do so. During this time the child lives with the commissioning parents. Presumably, if the surrogate mother decides to keep the child, the child will then be returned to her. It is submitted that this is most unsatisfactory, as the child will then have had an opportunity to bond with the commissioning couple, and it may not be in the child's best interests to be uprooted. Accordingly, the surrogate mother should be

afforded a suitably short period of time in which to make her decision, and once that decision is made, her consent to the transfer of parentage should be irrevocable.

The surrogate mother should be able to compel the commissioning parents to assume responsibility for the child as it will be unfair to burden her with the responsibility of a child she had not planned to keep. The commissioning parents instigated the arrangement, and consequently must assume a greater share of the responsibility.

In conclusion, it is submitted that the best interests of the child should guide the court in determining parentage. The approaches of the Commission, the Committee and other jurisdictions, although not always couched in the terms of 'best interests', are premised on the belief that their process for assigning parentage reflect this principle, demonstrating the subjective nature of this concept. Consequently, legislation should aim at avoiding an overly rigid approach as epitomised in *Johnson v Calvert*,<sup>593</sup> and to a certain extent displayed in the Commission's recommendations, both of which over-emphasise the intention of the parties. Clearly, the parties' intention at the outset should not necessarily determine the fate of the child at the end of the process.

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<sup>593</sup> *Johnson v Calvert* 851 P 2d 766 (1993)



## CHAPTER SEVEN

### COMMERCIAL SURROGACY

#### 7.1. Introduction

'[I]t is trite to state that certain things - such as genuine feelings of love - cannot be bought. It is no less obvious that there exist things which are not traded - even though in principle they could be - because for one reason or another, they are considered inappropriate for commodification'.<sup>594</sup> The exchange of money between the parties to a surrogacy arrangement is contentious. It would appear that the reasons for the controversy include both the fear that the parties face harm as they are exposed to the possibility of exploitation, as well as concern that commodification will lead to the degradation of human life. Although closely related, these concerns are distinct and merit careful examination.

Opponents of commercial surrogacy argue that buying a woman's reproductive services is degrading. A woman's reproductive capacities are integral to her person, and for this reason should not be the object of a market transaction. Harding discusses the obvious comparisons between surrogacy and prostitution. 'Both appear to be an arrangement in which a woman 'sells her body' in a way deemed more intimate and somehow more morally problematic than, say, the selling of muscle power as labour in return for a wage. Questions centre partly on what the sexual and reproductive organs are thought to be for, and whether exchanging their use for money is compatible with their assumed purpose. ... From a feminist perspective, an objection might be that both prostitution

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<sup>594</sup> Neil Duxbury 'Do Markets Degrade?' (1996) 59(3) *Modern Law Review* 331 at 331

and surrogacy depend on women trading specifically female aspects of their biology, and the danger is that women's sexual and reproductive abilities will be emphasised to the detriment of their other abilities and potentialities. ... [T]he use of prostitution and surrogacy as means of earning money may well serve to reinforce women's disadvantage in other economic activities, and to reinforce the view of women as having primarily a sexual and reproductive function in relation to society as a whole'.<sup>595</sup> Thus, it is feared that commercial surrogacy is not only degrading, but may encourage the perpetuation of gender stereotypes.

It is also argued that surrogacy arrangements degrade children by treating them as commodities - objects to be bought and sold. Veile suggests that surrogacy is little more than a thinly disguised trade in children. The 'surrogate mother provides her ovum, and enters into [an] arrangement with the clear understanding that she is to avoid the responsibility for the life she creates. Accordingly, her motives for bearing children change from a desire to have them for their own sake, to a desire to have them because they can provide some benefit. In fact, she bears the child not because she desires it, but because she desires something from it. In essence babies are turned into commodities'<sup>596</sup>

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<sup>595</sup> L M Harding 'The Debate on Surrogate Motherhood: The Current Situation, Some Arguments and Issues; Questions Facing Law and Policy' (1984) *Journal of Social Welfare and Family Law* 37 at 59-60, discussed in Jo Bridgeman and Susan Millns (eds) *Feminist Perspectives on Law. Law's Engagement with the Female Body* (1998) 177-178

<sup>596</sup> Barbara Veile 'Surrogate Motherhood: The Need for Social Acceptance' (1986) 13(3) *Ohio Northern University Review* 517 at 527

The argument that commercial surrogacy degrades women and children can be criticised for being overly moralistic. Generally, the characteristics of any moral argument are that the feared harms are highly speculative in nature, and no attempt is made to measure the benefits against the potential harms. Meyerson submits that moral arguments are not sufficient reason to justify prohibition of a practice unless there is a real possibility that the parties concerned will actually suffer harm.<sup>597</sup>

Duxbury concedes that the argument that commercial surrogacy commodifies children and degrades women is emotive, but submits that it is not convincing for the following reasons. Firstly, the argument relies on depicting the most extreme scenario, thereby presenting a distorted image of the parties involved. 'For those who fear the degrading effects of commodification, the surrogate mother tends to be portrayed as a victim of market forces who, owing to material hardship, is prepared to conceive a child for no other reason than material advantage. Prospective parents, in turn, tend to be depicted as classic rational economic agents who not only treat the commercial surrogacy agreement as a contract for the supply of goods, but who are prepared to refuse to take possession of, or assume responsibility for, those goods if they turn out to be other than expected. Such depictions rarely capture the reality of surrogacy arrangements'.<sup>598</sup>

Secondly, it is normal for people to sell talents and abilities which might be regarded as integral to self - for example teachers, musicians and athletes - without this resulting in

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<sup>597</sup> D Meyerson 'Surrogacy Agreements'. In Christina Murray (ed) *Gender and the New South African Order* (1994) 125

<sup>598</sup> Neil Duxbury 'Do Markets Degrade?' (1996) 59(3) *Modern Law Review* 331 at 343

a perception of degradation.<sup>599</sup> Moreover, prohibiting women from earning wages for their reproductive labour may well reinforce traditional gender stereotypes. Trebilcock questions whether 'reproductive labour [should] continue to be market exempt to protect against the exploitation of uneducated and financially disadvantaged women, or is it possible that by denying women the opportunity to profit from reproductive/gestational labour, this form of labour will continue to be under-valued by society'.<sup>600</sup>

In its favour, surrogacy attempts to address the problem of infertility which many couples face. There is tremendous pressure on couples to have children. 'Girls who are brought up to expect to be mothers can feel that they have failed if they do not fulfil these expectations'.<sup>601</sup> The adoption of a child is not always viable, and the liberalisation of attitudes towards illegitimacy and abortion has meant that there are fewer children to adopt. Furthermore, 'most people think that rearing their genetic offspring is better than rearing children who are not genetically theirs ... Other reasons for desiring genetically-linked offspring include property inheritance, carrying on the family name, and immortality'.<sup>602</sup> Thus, if surrogacy is regarded as an inherently valuable service, why then should payment make it less so? Surely it is unreasonable to expect a surrogate mother to endure the risks of pregnancy without some reward, even if only for loss of earnings, and expenses incurred.

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<sup>599</sup> Neil Duxbury 'Do Markets Degrade?' (1996) 59(3) *Modern Law Review* 331 at 342

<sup>600</sup> M J Trebilcock *The Limits of Contractual Freedom* (1993) 51

<sup>601</sup> Lynda Birke Susan Himmelweit Gail Vines *Tomorrow's Child: Reproductive Technologies in the 90's* (1990) 16

<sup>602</sup> Barbara Veile 'Surrogate Motherhood: The Need for Social Acceptance' (1986) 13(3) *Ohio Northern University Review* 517 at 524

Duxbury concludes that the argument that commercial surrogacy is degrading is essentially a moral evaluation and as such is not a good reason for restricting the practice. 'Where people are offended by what they perceive to be the degrading effects of commodification, their feelings ought not to count as a reason for curbing markets'.<sup>603</sup> There may well be reasons to justify the restriction of the market - for example, the market may create opportunities for widespread exploitation.

A more immediate concern is that the possibility of earning desperately needed money may tempt a woman to agree to be a surrogate mother without proper thought as to the consequences. Meyerson identifies three separate arguments with respect to commercial surrogacy and exploitation.<sup>604</sup> The first is the fear that the prospect of earning a fee is so tempting to the potential surrogate mother that it is coercive in itself.<sup>605</sup> The second argument is that a woman cannot give her free and unconditional consent prior to the child's birth.<sup>606</sup> The last argument concerns the possibility of the commissioning parents taking advantage of a surrogate mother's position to drive an 'unconscionable bargain'.<sup>607</sup>

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<sup>603</sup> Neil Duxbury 'Do Markets Degrade?' (1996) *Modern Law Review* 341 at 348

<sup>604</sup> D Meyerson 'Surrogacy Agreements'. In Christina Murray (ed) *Gender and the New South African Order* (1994) 131-132

<sup>605</sup> D Meyerson 'Surrogacy Agreements'. In Christina Murray (ed) *Gender and the New South African Order* (1994) 131

<sup>606</sup> D Meyerson 'Surrogacy Agreements'. In Christina Murray (ed) *Gender and the New South African Order* (1994) 131

<sup>607</sup> D Meyerson 'Surrogacy Agreements'. In Christina Murray (ed) *Gender and the New South African Order* (1994) 132

Meyerson argues that women should be given the opportunity to improve their financial circumstances, adding that a prohibition of commercial surrogacy arrangements will effect poorer women the most, as they will be denied the opportunity to earn desperately needed money.<sup>608</sup> 'If we think that respect for persons warrants prohibiting a mother from selling something personal to obtain food for her starving children, we do not respect her personhood more by forcing her to let them starve instead'.<sup>609</sup>

Moreover, a prohibition of the exchange of money does not automatically ensure that the arrangement is free from any form of exploitation. An ostensibly altruistic arrangement between family members or friends may mask a situation where the surrogate faces an inordinate amount of pressure. Many of the objections to commercial surrogacy are pertinent to altruistic surrogacy. Raymond notes that the 'so called altruism of non commercial surrogacy still reinforces the fact that women are breeders or mere maternal containers for someone else, whether done for money or love. The potential for exploitation is not necessarily less, merely because no money is involved, and the arrangements may take place in the family setting. The family has hardly been a safe place for women'.<sup>610</sup>

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<sup>608</sup> D Meyerson 'Surrogacy Agreements'. In Christina Murray (ed) *Gender and the New South African Order* (1994) 131

<sup>609</sup> D Meyerson 'Surrogacy Agreements'. In Christina Murray (ed) *Gender and the New South African Order* (1994) 131-132

<sup>610</sup> Janice G Raymond 'Of Eggs, Embryos and Altruism'. In H Patricia Hynes (ed) *Reconstructing Babylon: Women and Technology* (1990) 86

An additional concern is that the child is unable to consent to its own participation in the arrangement. Meyerson notes that parties who agree to exchange goods are usually allowed to do so. However, where children are involved, the state is obliged to ensure that the child's interests are protected. She argues that this is a reason for regulation and not prohibition.<sup>611</sup>

What precisely is being bought in the context of commercial surrogacy? The surrogate bears and gives birth to the child. In doing so she expends 'considerable labour and time, [suffers] a dramatic change in lifestyle, and [undertakes] additional responsibilities towards a potential human being'.<sup>612</sup> Thus, if payment is for her services, there can be no question of the child being a commodity. However, if the receipt of payment is conditional on the surrogate consenting to the termination of her parental rights, then the arrangement closely resembles the sale of a child. Thus, the pivotal question is whether 'the payment is designed to induce a parent to part with her child'?<sup>613</sup>

Even so, it is possible to argue that what is really being bought is the opportunity to be a parent. 'Although carrying a child to term may mark the beginning of becoming a parent, the real task of child rearing begins with the birth of the child. The care, love, and nurturing demanded by children involves substantial resources, many years of a parent's life, endless degrees of energy, patience, and understanding, and ongoing

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<sup>611</sup> D Meyerson 'Surrogacy Agreements'. In Christina Murray (ed) *Gender and the New South African Order* (1994) 127

<sup>612</sup> M J Trebilcock *The Limits of Contractual Freedom* (1993) 52

<sup>613</sup> Martha Garrison 'Surrogate Parenting: What Should Legislation Do?' (Summer 1988) 22(2) *Family Law Quarterly* 149 at 166

financial commitments. That money is required in the raising of children, whether it be to pay for day-care, education, health care, or other amenities of life, does not seem to have destroyed the love most parents feel for their children, and it is difficult to believe that allowing commercial surrogacy contracts is antithetical to this love'.<sup>614</sup>

A closer look at the commercial aspect of surrogate parenting reveals that the payment component can be divided into several categories. The first involves compensation of the surrogate mother for her medical and other reasonable expenses. The second is the payment of the surrogate for her services (in carrying the child to term and, subsequently, relinquishing her rights to the child). The third is the payment of third parties, such as commercial agencies, for their role in facilitating the arrangement.

As previously discussed, surrogate arrangements challenge traditional notions of motherhood. This is even more pronounced in those cases where the underlying reason for the agreement is money, and not love. Our society expects women to love their children in a way that is 'uniquely selfless'.<sup>615</sup> Where there is no exchange of money between the parties, it remains possible to view the surrogate's contribution as an act of selflessness on her part, and not as part of a transaction. However, research reveals that financial need does indeed prompt a large percentage of those women who act as surrogates.<sup>616</sup> This suggests that fewer women would act as surrogate mothers in the

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<sup>614</sup> M J Trebilcock *The Limits of Contractual Freedom* (1993) 52

<sup>615</sup> Lynda Birke Susan Himmelweit Gail Vines *Tomorrow's Child: Reproductive Technologies in the 90's* (1990) 29

<sup>616</sup> Barbara Veile 'Surrogate Motherhood: The Need for Social Acceptance' (1986) 13(3) *Ohio Northern University Review* 517 at 522 n 42



absence of a financial incentive to do so. It is submitted that if one permits surrogacy, it is counter-productive to frustrate access to it by making it difficult to find women willing to act as surrogate mothers.

Medical and legal professionals should be able to recover their fees for legitimate services rendered, but commercial agencies are widely regarded as undesirable. Commercial agencies or 'baby-brokers', whose business it is to facilitate surrogacy arrangements, are viewed almost universally with suspicion by legislators. In the pursuit of profit, unscrupulous organisations or individuals might be tempted to take advantage of the misfortune of others. The possibility of exploitation is high, and some horrifying accounts of exploitation have been documented. One such account documents an American baby-broker's plan to set up shop in a South American country because the women there are poor and, consequently more willing to act as surrogate mothers for a lesser fee than their North American counterparts.<sup>617</sup>

On the other hand, these brokers do offer a valuable service in bringing the parties together. An agency will typically introduce the commissioning parents to a surrogate mother. The agency should ensure that both the surrogate mother, and the commissioning couple are carefully screened in order to assess their suitability to participate in a surrogate arrangement. This is an extremely valuable service as proper screening can prevent the occurrence of problems associated with surrogacy arrangements. By banning these organisations, access to surrogacy is made much harder, forcing people to make their own arrangements. 'Surrogates found through

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<sup>617</sup> Gena Corea 'Junk Liberty' In H Patricia Hynes (ed) *Reconstructing Babylon: Women and Technology* (1990) 183 n 5

informal means are unlikely to receive counselling or to be well screened; they may indeed be young, poor, or emotionally disturbed and, thus, ripe for exploitation'.<sup>618</sup>

It appears that regulation is preferable to prohibition. A professional agency is in an excellent position to ensure that the parties receive the best possible assistance. This service would ideally involve screening of all prospective parties (and not just the surrogate mother) The screening should be thorough, and encompass both physical and psychological testing of the parties. The agency should also provide psychiatric or psychological counselling for the parties, and in the case of the surrogate mother should include counselling prior to and during the pregnancy, and also after she has given birth. In addition, the parties should be informed of their legal rights.

It is submitted that it is possible to ensure uniformity by requiring that agencies register with a licensing body. A licensed agency would have to comply with the requisite regulations, and dissatisfied persons would be able to direct their complaints to the licensing body. In South Africa, allowing licensed agencies to operate may lessen the burden on state resources.

The South African Law Commission proposes that 'no person shall in connection with a surrogate motherhood arrangement give or promise to give to any person, or shall receive from any person, a reward or compensation in money or in kind'.<sup>619</sup> The

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<sup>618</sup> Martha Garrison 'Surrogate Parenting: What Should Legislation Do?' (Summer 1988) 22(2) *Family Law Quarterly* 149 at 154

<sup>619</sup> Clause 10(1), Schedule A to the South African Law Commission *Report on Surrogate Motherhood* (Project 65: 1993)

Commission proposes that payment in the context of surrogate parenting be prohibited with the exception of compensation for those expenses that relate directly to the 'artificial fertilisation and pregnancy of the surrogate mother, the birth of the child and the confirmation of the surrogate motherhood agreement'.<sup>620</sup>

Provision is made for the compensation of *bona fide* services rendered by medical and legal professionals.<sup>621</sup> However, advertising is prohibited and it is an offence for a person 'in any way or with a view to compensation [to make it] known that any person is or might possibly be willing to enter into a surrogate motherhood agreement'.<sup>622</sup>

The Parliamentary Ad hoc Select Committee agrees that commercial surrogacy should be prohibited. Accordingly, it is of the view that legislation should provide that 'no person shall in connection with a surrogate motherhood agreement give or promise to give any person, or shall receive from any person, a reward or compensation in cash or in kind'.<sup>623</sup> The Committee states further that this prohibition will also apply to agents and brokers,<sup>624</sup> but excludes all 'medical, legal and other necessary expenses related to

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<sup>620</sup> Clause 10(2), Schedule A to the South African Law Commission *Report on Surrogate Motherhood* (Project 65: 1993)

<sup>621</sup> Clause 10(3), Schedule A to the South African Law Commission *Report on Surrogate Motherhood* (Project 65: 1993)

<sup>622</sup> Clause 12(2), Schedule A to the South African Law Commission *Report on Surrogate Motherhood* (Project 65: 1993)

<sup>623</sup> para 6.5.1, Parliamentary Ad Hoc Select Committee on the Report of the South African Law Commission on Surrogate Motherhood *Draft Final Report* dated October 1998 at 37

<sup>624</sup> para 6.5.1, Parliamentary Ad Hoc Select Committee on the Report of the South African Law Commission on Surrogate Motherhood *Draft Final Report* dated October 1998 at 37

surrogacy ... including all necessary expenses incurred for post-natal care'.<sup>625</sup> Reimbursement of the surrogate mother for her loss of earnings is permitted.<sup>626</sup> Lastly, the Committee recommends that insurance be permitted to cover the surrogate mother in the event of her death or disability as a result of the pregnancy.<sup>627</sup>

## 7.2. Comparative Perspective

### 7.2.1. United Kingdom

In the United Kingdom, the Warnock Committee recommended that commercial surrogacy agencies should be outlawed.<sup>628</sup> The Warnock Committee was of the opinion that 'the danger of exploitation of one human being by another ... far [outweighed] the potential benefit'.<sup>629</sup>

In response to public outrage surrounding the case of *Baby Cotton*,<sup>630</sup> the *Surrogacy Arrangements Act* was passed.<sup>631</sup> <sup>632</sup> In this case, the commissioning parents, an

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<sup>625</sup> para 6.5.1.1, Parliamentary Ad Hoc Select Committee on the Report of the South African Law Commission on Surrogate Motherhood *Draft Final Report* dated October 1998 at 37

<sup>626</sup> para 6.5.1.2, Parliamentary Ad Hoc Select Committee on the Report of the South African Law Commission on Surrogate Motherhood *Draft Final Report* dated October 1998 at 37

<sup>627</sup> para 6.5.1.3, Parliamentary Ad Hoc Select Committee on the Report of the South African Law Commission on Surrogate Motherhood *Draft Final Report* dated October 1998 at 37

<sup>628</sup> Report of the Committee of Enquiry into Human Fertilisation and Embryology Cmnd. 9314 (1984)

<sup>629</sup> Thomas E Eaton 'The British Response to Surrogate Motherhood: An American Critique' (1985) 19 *The Law Teacher* 163 at 170

<sup>630</sup> *Re C* [1985] F.L.R. 846

<sup>631</sup> *Surrogacy Arrangements Act* 1985

American couple, had entered into a surrogate contract with a British woman. It was agreed that the surrogate mother would receive \$10 000 for her services. The baby was born in January 1985, but before the couple could take the child to the United States the relevant local authority, intervened to obtain an order that authorised it to remove the child to a place of safety pending an inquiry.<sup>633</sup> The outcome of the inquiry found that the child's best interests were served by placing it with the commissioning parents, as the surrogate mother had expressed her unwillingness to retain the child.

As mentioned above, the outcry surrounding the Baby Cotton case prompted the Legislature to act swiftly in enacting the *Surrogacy Arrangements Act*.<sup>634</sup> However, the foundation for the Act had been laid with the recommendations of the Warnock Committee. As a result of these recommendations, the *Surrogacy Arrangements Act* prohibits commercial surrogacy and imposes criminal sanctions on those who might be considered to be baby brokers. The Act makes it an offence for persons to engage in activities related to the making or negotiating or facilitation of the making of any surrogacy agreement in exchange for a fee.<sup>635</sup> In addition, it is an offence to advertise in relation to a surrogate arrangement.<sup>636</sup>

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<sup>632</sup> Douglas notes that the enormous publicity surrounding the Baby Cotton case led to the *Surrogacy Arrangements Act* 1985. Gillian Douglas *Law Fertility and Reproduction* (1991) at 152

<sup>633</sup> M A Baggish 'Surrogate Parenting: What Can We Learn From Our British Counterparts' (1988-1989) 39 *Case Western Law Review* 217 at 219

<sup>634</sup> *Surrogacy Arrangements Act* 1985

<sup>635</sup> Section 2 (1), *Surrogacy Arrangements Act* 1985: 'No person shall on a commercial basis (a) initiate or take part in any negotiations with a view to the making of surrogacy arrangement, (b) offer or agree to negotiate the making of a surrogacy arrangement, or (c) compile any information with a view to its use in making, or negotiating the making of, surrogacy arrangements; and no person shall in the United Kingdom knowingly cause another to any of those acts on a commercial basis'.

<sup>636</sup> Section 3, *Surrogacy Arrangements Act* 1985

However, altruistic surrogacy arrangements are not prohibited. In addition, in order to avoid children being born to mothers subject to the taint of criminality,<sup>637</sup> the exchange of money between the immediate parties to a surrogate agreement is not subject to criminal sanction.<sup>638</sup> Morgan comments that the purpose of these restraints is aimed at keeping surrogacy a family affair.<sup>639</sup>

It is argued that under the provisions of the Act, the position of legal and medical practitioners offering professional services to the parties for a fee is extremely precarious.<sup>640</sup> Sloman submits that the wording of section 2 is wide enough to cover the *bona fide* services of medical and legal professionals assisting the parties to a surrogacy arrangement for a fee. She argues that if surrogacy is to be permitted at all then 'the law should ensure that the parties directly involved are not exploited and that legal, medical and other necessary facilities are available to them'.<sup>641</sup>

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<sup>637</sup> Report of the Committee of Enquiry into Human Fertilisation and Embryology Cmnd. 9314 (1984) at para 8.19

<sup>638</sup> Section 2(2), *Surrogacy Arrangements Act* 1985: 'A person who contravenes subsection (1) above is guilty of an offence, but it is not a contravention of that subsection - (a) for a woman, with a view to becoming a surrogate mother herself, to do any act mentioned in that subsection or to cause such an act to be done, or (b) for any person, with a view to a surrogate mother carrying a child for him, to do such an act or to cause such an act to be done.'

<sup>639</sup> D Morgan 'Who to Be Or Not to Be: The Surrogacy Story' (May 1986) 49 *Modern Law Review* 358 at 364

<sup>640</sup> S Sloman 'Surrogacy Arrangements Act 1985' (1985) *New Law Journal* 978

<sup>641</sup> S Sloman 'Surrogacy Arrangements Act 1985' (1985) *New Law Journal* 978 at 979-980

Despite the enactment of the *Human Fertilisation and Embryology Act*,<sup>642</sup> commercial surrogacy is still subject to criminal sanction. The provisions of section 30 to that Act allow commissioning parents to apply to Court for a parental order which would declare them to be the legal parents of a child born of a surrogacy agreement. However, the court will not grant this order unless it is satisfied that no payments were made to the surrogate mother with the exception of her reasonable expenses or those expenses authorised by the Court.<sup>643</sup>

### 7.2.2. United States

A similar situation prevails in the United States with regard to attitudes to commercial surrogacy. As a result, much of the litigation in the United States has involved establishing whether commercial surrogacy contracts fall foul of state adoption statutes which prohibit parents from relinquishing their parental rights for money.

In *Surrogate Parenting Association, Inc v Commonwealth of Kentucky*,<sup>644</sup> the Kentucky Supreme Court distinguished between surrogacy arrangements and contracts for the purchase of a child. It held that surrogacy arrangements do not violate 'baby selling' laws, as the birth mother is not financially pressured into surrendering the child. The Court reasoned that the payment is not aimed at coercing the surrogate mother to surrender the child, as the surrogate agrees to carry the child prior to conception. She

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<sup>642</sup> *Human Fertilisation and Embryology Act* 1990

<sup>643</sup> Section 30(7), *Human Fertilisation and Embryology Act* 1990

<sup>644</sup> *Surrogate Parenting Association, Inc v Commonwealth of Kentucky* 704 S.W. 2d 209 (1986)

enters the agreement of her own free will, and hence cannot be said to have been coerced to part with her child.

In the case of *Doe v Kelley*,<sup>645</sup> the Michigan Appeal Court held that surrogacy arrangements are a legitimate way of having children, but found that commercial surrogacy arrangements contravene adoption laws. In this case, the commissioning couple contracted with the surrogate mother. It was agreed that she would be paid the sum of \$5 000. The contract made express provision for the surrogate mother to terminate her parental rights. The Court was asked to rule on the issue of prohibition of payment in the case of surrogacy. The Court held that although the relevant statute did not directly prohibit surrogacy, the payment of consideration in the context of surrogacy arrangements constitutes a violation of adoption statutes.

In the case of *Baby M*,<sup>646</sup> the New Jersey Supreme Court held that surrogacy contracts are invalid, and held that surrogacy 'amounts to the sale of a child, or at the very least, the sale of a mother's right to her child, the only mitigating factor being that one of the purchasers is the father. Almost every evil that prompted the prohibition on the payment of money in connection with adoptions exist here'.<sup>647</sup>

Many state legislatures, including the states of Florida, Indiana, Kentucky, Louisiana, Michigan, and Nebraska, <sup>648</sup> have passed legislation aimed at the prohibition of

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<sup>645</sup> Court of Appeals of Michigan, 1981. 106 Mich.App. 169, 307 N.W.2d 438

<sup>646</sup> *In the Matter of Baby M* 109 N J 396 410-411 537 A 2d 1227, 1234 (1988)

<sup>647</sup> *In the Matter of Baby M* 109 N J 396 410-411 537 A 2d 1227, 1234 (1988) at 1250

<sup>648</sup> Diederika Pretorius *Surrogate Motherhood: A Worldwide View of the Issues* (1994) 55



commercial surrogacy. In Washington and Utah it is a misdemeanour to conclude a surrogacy contract for gain, and all such agreements are void.<sup>649</sup> The state of New Hampshire allows for the implementation of certain judicially approved surrogacy contracts.<sup>650</sup> Although an exception is made for certain expenses relating to pregnancy, life insurance, legal costs and counselling, commercial surrogacy is not tolerated and solicitation is proscribed. Similarly, in Virginia,<sup>651</sup> surrogate brokering of any kind is prohibited, although provision is made for compensation relating to the surrogate mother's reasonable expenses. However, Alabama, and West Virginia expressly exclude surrogate arrangements from the ambit of state baby selling statutes,<sup>652</sup> thereby allowing surrogate agencies to operate.

### 7.2.3. Canada

At present, Canadian law does not make provision for surrogacy arrangements. However, it is likely that commercial surrogacy falls foul of legislative provisions aimed at prohibiting the trade in children. As in the United States, these legislative provisions are to be found in adoption and child protection statutes, which attempt to restrict those who may arrange adoptions, and restrict payment of consideration in the context of adoption arrangements.

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<sup>649</sup> Diederika Pretorius *Surrogate Motherhood: A Worldwide View of the Issues* (1994) 55

<sup>650</sup> A Hofheimer 'Gestational Surrogacy: Unsettling State Parentage Law and Surrogacy Policy' (1992) 19(3) *New York University Review of Law and Social Change* 571 at 614

<sup>651</sup> Diederika Pretorius *Surrogate Motherhood: A Worldwide View of the Issues* (1994) 55

<sup>652</sup> A Hofheimer 'Gestational Surrogacy: Unsettling State Parentage Law and Surrogacy Policy' (1992) 19(3) *New York University Review of Law and Social Change* 571 at 613-616

The province of Ontario undertook extensive research into surrogacy arrangements, and in contrast to most other jurisdictions its proposals are extremely facilitative of surrogacy. The Ontario Law Reform Commission proposed that the issue of payment be left to the discretion of the Court which would have to approve the payment of any monies.<sup>653</sup>

In 1992 the Law Reform Commission of Canada published the results of its investigation into medically assisted reproduction. The Commission stated that the activities of paid intermediaries should be met with criminal sanction.<sup>654</sup> The Commission submitted that payment of a surrogate mother amounts to the sale of a child, and is not payment for services, as is sometimes argued. 'In surrogacy, unlike adoption, the child is conceived specifically to be surrendered in return for a sum of money ... Even if the transaction were not the sale of a child, the result would be too much like a sale to be treated differently. Any attempts to commercialise (payments to surrogates and intermediaries) should be expressly prohibited. A recommendation to this effect would follow the logic of the prohibitions that currently apply to adoption and child protection'.<sup>655</sup> However, the Law Reform Commission decided that the immediate parties to a surrogacy contract (as opposed to intermediaries) should not be subject to criminal sanction because it was of the opinion that this might result in the

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<sup>653</sup> The South African Law Commission discusses the recommendations of the Ontario Law Reform Commission *Report on Human Artificial Reproduction and Related Matters* (1985). South African Law Commission *Report on Surrogate Motherhood* (Project 65: 1993) 56

<sup>654</sup> Law Reform Commission of Canada *Medically Assisted Reproduction* (Working Paper 65: 1992) 137-138

<sup>655</sup> Law Reform Commission of Canada *Medically Assisted Reproduction* (Working Paper 65: 1992) 136

practice of surrogacy being driven underground.<sup>656</sup> Furthermore, it held that it is not in the best interests of a child to be born to parents who face prosecution.<sup>657</sup>

### 7.3. Recommendations of the South African Law Commission

Payment in the context of a surrogacy arrangement poses a problem. As previously discussed, the surrogate is regarded as the child's legal mother, and she would have to consent to its adoption by the commissioning parents. Section 24 of the *Child Care Act* makes the receipt of remuneration in the context of adoption a criminal offence.<sup>658</sup> However, the regulations to the Act do make provision for compensation for the natural mother's expenses.<sup>659</sup>

The South African Law Commission acknowledges the difficulties involved in enforcing a complete ban on commercial surrogacy. If the parties agree to a fee in private it will be extremely difficult to establish whether there has been an exchange of money.<sup>660</sup> Nevertheless, the Commission hopes that the prospect of not receiving

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<sup>656</sup> Law Reform Commission of Canada *Medically Assisted Reproduction* (Working Paper 65: 1992) 137-138

<sup>657</sup> Law Reform Commission of Canada *Medically Assisted Reproduction* (Working Paper 65: 1992) 138

<sup>658</sup> Section 24 states that '(1) no person shall, save as prescribed under the *Social Work Act*, 1978 (Act No. 110 of 1978) give, or undertake to give, receive or undertake to receive any consideration, in cash or kind, in respect of the adoption of a child. (2) Any person who contravenes any provision of subsection (1) shall be guilty of an offence and on conviction liable to a fine not exceeding R8000 or to imprisonment for a period not exceeding two years or to both such fine and such imprisonment'. *Child Care Act* 74 of 1983

<sup>659</sup> Regulation 21(1)(b)(iii) in terms of the section 60 of the *Child Care Act* 74 of 1983 under GN R 2612 of 12 December 1986

<sup>660</sup> South African Law Commission *Report on Surrogate Motherhood* (Project 65: 1993) 160

compensation will discourage the 'profit minded' potential surrogate mother.<sup>661</sup> The Commission views commercialism in the context of surrogacy as being wholly undesirable and accordingly proposes that payment in the context of surrogate parenting be prohibited with the exception of compensation for those expenses that relate directly to the 'artificial fertilisation and pregnancy of the surrogate mother, the birth of the child and the confirmation of the surrogate motherhood agreement'.<sup>662</sup>

The Commission goes on to propose that the surrender of the child should not be connected to the payment of compensation. Consequently, the commissioning parents, as the child's legal parents, have the right of custody of the child despite the existence of a dispute with respect to payment of compensation. In the event of a dispute, the Commission recommends that it is dealt with only once the child has been handed to the commissioning parents.<sup>663 664</sup>

Provision is made for the compensation of *bona fide* medical and legal professionals, even where the agreement is not subsequently confirmed by a court for whatever reason.<sup>665</sup> However, it is an offence for a person 'in any way or with a view to compensation [to make it] known that any person is or might possibly be willing to

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<sup>661</sup> South African Law Commission *Report on Surrogate Motherhood* (Project 65: 1993) 160

<sup>662</sup> Clause 10(2) Schedule A to the South African Law Commission *Report on Surrogate Motherhood* (Project 65: 1993)

<sup>663</sup> South African Law Commission *Report on Surrogate Motherhood* (Project 65: 1993) 150

<sup>664</sup> The Commission is of the opinion that if custody of the child is eliminated as a ground of litigation the law of contract and delict make sufficient provision in the event of the parties wishing to litigate against each other'. South African Law Commission *Report on Surrogate Motherhood* (Project 65: 1993) at 159

<sup>665</sup> Clause 10(3), Schedule A to the South African Law Commission *Report on Surrogate Motherhood* (Project 65: 1993)

enter into a surrogate motherhood agreement'.<sup>666</sup> The Commission is also of the belief that the prohibition of advertising may also restrict commercialism.<sup>667</sup> However, the Commission does not prohibit the dissemination of information by individuals or organisations, where their activities are not linked to a profit motive. Although the Commission expressed its reluctance to criminalise any aspect of surrogacy arrangements, it was of the opinion that such a measure would serve as a deterrent to those parties tempted to assist in the establishment of an illegal surrogacy arrangement.<sup>668</sup>

It is submitted that a ban on commercial agencies is unnecessary, and that properly regulated agencies could be invaluable in facilitating access to surrogacy, and in alleviating the burden on state resources. Present government health policies promote primary health care, and it is unlikely that the needs of infertile couples will be a priority. However, the demand for surrogacy arrangements is likely to increase with the relaxation of abortion laws, and the consequent decline in the number of babies available for adoption.

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<sup>666</sup> Clause 12(2), Schedule A to the South African Law Commission *Report on Surrogate Motherhood* (Project 65: 1993)

<sup>667</sup> South African Law Commission *Report on Surrogate Motherhood* (Project 65: 1993) 158

<sup>668</sup> South African Law Commission *Report on Surrogate Motherhood* (Project 65: 1993) 158

### **7.3.1. Recommendations of the Parliamentary Ad Hoc Select Committee on the Report of the South African Law Commission**

The Parliamentary Ad Hoc Select Committee agrees with the South African Law Commission's proposal that commercial surrogacy should be prohibited.<sup>669</sup> Accordingly, it is of the view that legislation should provide that 'no person shall in connection with a surrogate motherhood agreement give or promise to give any person, or shall receive from any person, a reward or compensation in cash or kind'.<sup>670</sup> However, it proposes that exception should be made for 'medical, legal and other necessary expenses related to the surrogacy arrangement 'including all necessary expenses incurred for post-natal care,<sup>671</sup> as well as any loss of earnings the surrogate mother might suffer.<sup>672</sup> It also recommends that the parties arrange insurance to cover the surrogate mother in the event of her death or disability as a result of the pregnancy.<sup>673</sup>

The Committee permits compensation for the surrogate mother's necessary expenses and loss of earnings. This, however, implies that the surrogate mother must have had a form of employment prior to the pregnancy. It is submitted that if 'loss of earnings' is to

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<sup>669</sup> para 6.5.1, Parliamentary Ad Hoc Select Committee on the Report of the South African Law Commission on Surrogate Motherhood *Draft Final Report* dated October 1998 at 37

<sup>670</sup> para 6.5.1. & 6.10.2, Parliamentary Ad Hoc Select Committee on the Report of the South African Law Commission on Surrogate Motherhood *Draft Final Report* dated October 1998 at 37

<sup>671</sup> para 6.5.1.1, Parliamentary Ad Hoc Select Committee on the Report of the South African Law Commission on Surrogate Motherhood *Draft Final Report* dated October 1998 at 37

<sup>672</sup> para 6.5.1.2, Parliamentary Ad Hoc Select Committee on the Report of the South African Law Commission on Surrogate Motherhood *Draft Final Report* dated October 1998 at 37

<sup>673</sup> para 6.5.1.3, Parliamentary Ad Hoc Select Committee on the Report of the South African Law Commission on Surrogate Motherhood *Draft Final Report* dated October 1998 at 37

include 'loss of earning capacity', this may in practice amount to an indirect way of compensating the surrogate mother for her services.

The Committee does not make express provision for payment of a fee to the surrogate mother for services rendered. However, if one follows the Committee's reasoning there should be no objection to payment of the surrogate in the case of full surrogacy, as the Committee regards the birth mother as a surrogate in the true sense of the word, and consequently she does not sell her parental rights. Payment in these circumstances would not contravene the relevant provision of the *Child Care Act*.<sup>674</sup> In the case of partial surrogacy, the birth mother transfers her parental rights to the commissioning parents, and accordingly it is possible to interpret the exchange of monies (other than for expenses) as payment for the child itself.

The Committee provides that advertising that any person is willing to enter into a surrogacy contract, whether for gain or otherwise, is an offence. This provision will make it difficult for commissioning parents to find a surrogate mother. As is noted above, the more difficult access to surrogacy is made, the greater the likelihood that potential commissioning parents will resort to informal or clandestine arrangements.

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<sup>674</sup> Section 24, *Child Care Act* 74 of 1983

#### 7.4. Conclusion:

Many commentators view the prospect of commercial surrogacy with alarm. Opponents to commercial surrogacy are concerned that commercial surrogacy will contribute to the degradation of women and children, and fear that vulnerable persons will be exploited.

These arguments are criticised as being both moralistic and paternalistic. Meyerson states that there can be no justification for interfering with a person's freedom on either of these grounds. 'We should not interfere with a person's freedom [on paternalistic grounds] for the same reason that we should not interfere on moralistic grounds, namely that judgements as to what is in a person's best interests, like judgements about what is morally admirable and what repugnant, differ, and they differ reasonably'.<sup>675</sup> In other words, unless there is a good reason for interfering with a person's freedom, he or she should be permitted to determine his or her own course of action. The fear that permitting people the freedom to choose will expose them to the possibility of exploitation is better addressed by regulating the practice of surrogacy itself.

Commercialism in the context of surrogacy includes a wide spectrum of activities. It is submitted that it is desirable to permit the payment of compensation for the legitimate services of legal and medical professionals. The parties should not be expected to participate in a surrogacy arrangement without recourse to these professional services.

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<sup>675</sup> D Meyerson 'Surrogacy Agreements'. In Christina Murray (ed) *Gender and the New South African Order* (1994) 133



In addition, it is submitted that a surrogate mother should be permitted to claim her reasonable expenses, including loss of earnings.

Both the South African Law Commission and Parliamentary Ad Hoc Select Committee prohibit surrogacy for financial gain. However, they permit certain categories of payments, in particular those pertaining to the surrogate mothers reasonable expenses. However, both the Commission and Committee prohibit the payment of a fee to the surrogate mother. It is submitted that if the parties are required to make full disclosure of their financial arrangements to the Court, there is no reason to object to payment of a fee to the surrogate mother. When confirming the arrangement, the Court will have an opportunity to assess the quantum of the fee which is to be paid, and make any order it may deem necessary with respect to payment of the surrogate mother.

It is submitted that the surrogate mother should be able to earn a reasonable fee with respect to the services she renders. It has been shown that surrogate mothers are motivated by the prospect of earning a fee and by prohibiting payment many potential surrogate mothers will be discouraged. This may create a situation where surrogacy is permitted, but it is extremely difficult for the commissioning parents to find anyone willing to act as a surrogate mother. They may well have to resort to a clandestine arrangement, which will expose the parties to the risk of exploitation.

In addition, it is submitted that it may be advantageous to permit commercial surrogacy agencies to operate, provided they are subject to strict regulation. Agencies are able to provide valuable services, but the failure to control their activities has led to their being viewed with suspicion. In particular, licensed agencies can screen and counsel the

parties - a necessary function that would otherwise fall to a state funded body. As the thrust of health services is towards the provision of primary care, it is unlikely that the state will be able to finance statutory screening bodies to any great extent.

## CHAPTER EIGHT

### CONCLUDING REMARKS

If properly regulated, surrogacy arrangements are of great assistance to those who are otherwise unable to have children. The regulation of surrogacy is both a method of control, and a way of legitimising the practice.<sup>676</sup> However, as the decision to beget and bear children is clearly of a personal nature, it is submitted that the state should refrain from interfering in the exercise of that decision, except where absolutely necessary. Unfortunately, surrogacy arrangements can be abused, and accordingly in certain jurisdictions lawmakers have intervened to protect the interests of their citizens. However, the temptation is to over-regulate, a tendency that can have unfortunate consequences. Freeman refers to the *Surrogacy Arrangements Act*,<sup>677</sup> which prohibits the practice of commercial surrogacy in the United Kingdom.<sup>678</sup> He notes that the prohibition of commercial surrogacy prevents commercial surrogacy agencies from operating. A non-profit organisation is operative but does not screen the parties, which leaves scope for 'the lurking suspicion that better ... arrangements may have been negotiated by the very agencies targeted by the legislation'.<sup>679</sup>

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<sup>676</sup> M D A Freeman 'Responding to the Reproduction Revolution: Law Reform - Dilemmas and Difficulties'. In Sheila A M Mclean (ed) *Law Reform and Human Reproduction* (1992) 4

<sup>677</sup> *Surrogacy Arrangements Act* 1985

<sup>678</sup> M D A Freeman 'Responding to the Reproduction Revolution: Law Reform - Dilemmas and Difficulties'. In Sheila A M Mclean (ed) *Law Reform and Human Reproduction* (1992) 4

<sup>679</sup> M D A Freeman 'Responding to the Reproduction Revolution: Law Reform - Dilemmas and Difficulties'. In Sheila A M Mclean (ed) *Law Reform and Human Reproduction* (1992) 4

For women, the advent of the new reproductive technologies permits greater control of their reproductive capacities. However, Stanworth comments that '[m]edical and scientific advances in the sphere of reproduction - so often hailed as the liberators of twentieth century women - have, in fact, been a double edged sword. On the one hand, they have offered women a greater technical possibility to decide if, when and under what conditions to have children; on the other hand, the domination of so much reproductive technology by the medical profession and by the state has enabled others to have an even greater capacity to exert control over women's lives'.<sup>680</sup> The control of reproduction is seen as a central concern in the struggle for gender equality, and in the past, the state's reluctance to intervene in matters considered to fall within the private realm has operated to the disadvantage of women.<sup>681</sup>

Thus, it is submitted that the decision to regulate surrogacy arrangements should be approached with care, and where appropriate the individuals concerned should be left to order their own arrangements. However, lawmakers should not lose sight of the opportunities for exploitation, and should act to lessen the possibility of harm. In the context of surrogacy, lawmakers should also heed the results of studies that reveal that women who act as surrogate mothers are generally poorer, and have fewer financial resources than the commissioning parents.<sup>682</sup> It is submitted that for this reason and because the surrogate mother is required to perform a task of an extremely intimate

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<sup>680</sup> M Stanworth 'Reproductive Technologies and the Deconstruction of Motherhood'. In M Stanworth (ed) *Reproductive Technologies: Gender, Motherhood and Medicine* (1987) 15-16

<sup>681</sup> Jo Bridgeman and Susan Millns *Feminist Perspectives on Law. Law's Engagement With the Female Body* (1998) 110

<sup>682</sup> R. Alto Charo 'United States: Surrogacy'. In Sheila A M Mclean *Law Reform and Human Reproduction* (1992) 223 at 226

nature, that care should be taken to ensure that the interests of the surrogate mother as well as the child are protected.

The South African Law Commission has recommended that any agreement that does not comply with the proposed legislation should be invalid. The effect of this is unfortunate, and appears to be contrary to the intentions of the Commission, which was to formulate a careful approach where the interests of the child are placed first and foremost.<sup>683</sup> Where the contract is unenforceable, none of the parties are protected. For example, what will happen where a child is born physically or mentally handicapped, and the commissioning parents are unwilling to take responsibility? If the contract is invalid, then both the surrogate mother and the child are in a precarious position.

This in turn raises the question of whether or not the commissioning parents should be able to compel the surrogate mother to relinquish the child. The Commission recommends that the commissioning parents be permitted to do so, and justifies its recommendation on the grounds that the surrogate mother is not genetically related to the child. It is submitted that this approach places too great an emphasis on the genetic aspect of parenting, ignoring the physiological and emotional tie between the surrogate mother and the child. Katz Rothman comments that in patriarchal society, 'women's rights to their children do not derive from having grown them in their bodies, with the blood of their bodies, passing them through their genitals, and suckling them at their breasts. These latter functions are interesting but irrelevant. What makes the child a woman's is that it is "half" hers; it has her genetic material as well as the man's

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<sup>683</sup> South African Law Commission *Report on Surrogate Motherhood* (Project 65: 1993) 146

material. The primacy of the genetic material is still the defining social relationship'.<sup>684</sup> Given the intimate nature of the relationship between the surrogate mother and child, it can be expected that a bond will form between them, and that compelling the surrogate mother to relinquish the child may be harmful to both. It is submitted that it is impossible to do justice to the all parties in the event of breach, and consequently the law should protect the interests of those parties who are most vulnerable, namely the surrogate mother and child.

The Commission proposes that only married heterosexual couples be permitted access to surrogacy. The Commission's recommendation implies that a person, whose chosen lifestyle does not fit the definition of the 'nuclear' family, will not be permitted recourse to surrogacy. The Parliamentary Ad Hoc Select Committee disagrees, and recommends that any suitable and competent persons be permitted access to surrogacy. Clearly, this recommendation is correct, as restricting surrogacy to married heterosexual couples would appear to be both unfair and unconstitutional. It is submitted that the merits of each case should be assessed, and the parties thereto thoroughly screened. If screening reveals that the particular individuals are unsuitable for parenthood, then they should be denied recourse to surrogacy. However, irrelevant characteristics such as a person's sexual orientation or marital status should not figure in the screening process.

Both the South African Law Commission and Parliamentary Ad Hoc Select Committee propose that a written surrogacy agreement must be submitted for confirmation by the Court, before impregnation of the surrogate mother can take place. Presumably, the

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<sup>684</sup> Barbara Katz Rothman 'Reproductive Technologies and Surrogacy: A Feminist Perspective' (1991-1992) 25(5) *Creighton Law Review* 1599 at 1602

Court is to play the role of watchdog, although the Committee does propose that the Court is assisted by a state funded screening body, whose task it is to submit a report to the Court. The Commission's recommendations are vague in this regard, and the parties are given little guidance as to how they should go about convincing the court of their suitability. It is suggested that, as is the case in Israel, a panel of experts could evaluate the surrogacy contract. However, if the Court is to confirm the agreement, it will need resources to investigate each application, in which case the Office of the Family Advocate may be of assistance.

Once the surrogate mother conceives, the commissioning parents may wish to prevent her from doing certain things. This is a difficult issue, as any attempt to restrict the surrogate mother's conduct is likely to involve a significant invasion of her personal freedom. Although the parties may provide for this in their agreement, in practice the commissioning parents are likely to find such terms difficult to enforce, as enforcement may mean constant surveillance, confinement or even forcing the surrogate mother to undergo medical procedures. Clearly, this cannot be permitted. Unfortunately, both the Commission and the Committee fail to address this issue.

Similarly, in the case of abortion, it is submitted that the commissioning parents should not be able to compel the surrogate mother to undergo an abortion, nor should they be able to prevent her from terminating the pregnancy should she feel it necessary. This may appear harsh, but to permit otherwise may result in a situation where the surrogate mother is forced to undergo an invasive medical procedure against her wishes, or is compelled to carry the child to term. The surrogate mother should have the same rights

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as any other pregnant woman in this regard, and, in particular, forcing her to carry the child to term amounts to slavery. The Commission's recommendations in this regard are no longer applicable. However, in the case of non-therapeutic abortion, it recommends that the decision to undergo an abortion is that of the surrogate mother. In contrast, the Committee proposes that the parties make provision for abortion in their contract. It is submitted that this is unacceptable, as permitting the parties to regulate this aspect of the arrangement, does not adequately protect the interests of the surrogate mother.

Determining which of the parties are the child's parents is difficult. As previously mentioned, the genetic, biological and social parents are all able to claim parenthood. In addition, *Johnson's* case introduced the notion of maternal intent to assign parenthood to the commissioning mother,<sup>685</sup> in effect providing for the specific enforcement of the surrogacy contract. The 'best interests' test has also been used to assign parenthood. However, application of the test is to a large extent subjective. In some jurisdictions, the best interest's test has been interpreted in such a way that the birth mother will almost always gain custody of the child.<sup>686</sup> The factor of maternal bonding is heavily weighted, and unless the birth mother is an unfit mother, or does not want the child,<sup>687</sup> she is likely to be the successful party in the event of a dispute. In other jurisdictions, the surrogate mother's willingness to participate in a paid surrogacy arrangement has counted against her, and this together with the fact that the commissioning father was able to offer a stable and affluent home resulted in an award

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<sup>685</sup> *Johnson v Calvert* 851 P 2d 766 (1993)

<sup>686</sup> See *A v C* [1985] F.L.R. 445. See also in *Re P* [1987] 2 F.L.R. 421



of custody to him.<sup>688</sup> The South African Law Commission also uses the best interests of the child to justify its proposal that the commissioning parents are deemed to be the child's legal parents. It states that '[i]t is of cardinal importance that the best interests of the child are considered before conception. Situations where a court has to decide thereon ex post facto should be prevented at all costs'.<sup>689</sup> The Committee has a dual system for the assignment of parentage. In the case of full surrogacy, the commissioning parents are deemed to be the child's legal parents. This approach can be criticised for a number of reasons. In effect it provides for the specific enforcement of the contract, placing certainty above the interests of the child. It is possible that during the gestative period, the commissioning couple's circumstances have changed. These recommendations make no provision for this eventuality. Furthermore, it does not take into account the emotional tie that is likely to exist between the surrogate mother and child as a result of her carrying it to term.

In the case of partial surrogacy, the Committee proposes a system of 'fast track' adoption that closely resembles the English model. Although this system provides the surrogate mother with a window period in which to make up her mind about relinquishing the child, this approach is problematical. The Committee provides that the child should be handed to the commissioning parents at birth. This means that should the surrogate mother decide not to relinquish the child, the child will have to be returned to her. As the window period is lengthy the child may have lived with the

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<sup>687</sup> See *Re C* [1985] F.L.R. 846

<sup>688</sup> See in *Re Baby M* 525 A.2d 1127 (N.J. Super Ct.1987). See also the Appeal Court's decision in *Re Baby M* 109 N.J. 396 A.2d 1227 (1988)

<sup>689</sup> South African Law Commission *Report on Surrogate Motherhood* (Project 65: 1993) 156

commissioning parents for quite some time, and this separation is likely to be traumatic. It is submitted that the surrogate mother should have time to decide whether or not to relinquish the child, but that the period of time the Committee recommends is far too long.

The surrogate mother's position is also precarious should the commissioning parents decide that they no longer wish to take the child. Although, she can request the court to enforce the contract, it is submitted that this is not a satisfactory solution as the child is not a chattel to be passed back and forth. The surrogate mother may succeed in an award for damages, but at the end of the day is burdened with the responsibility of a child she had not planned to keep. It is submitted that the surrogate mother should be able to compel the commissioning parents to take the child. It may seem unfair to force the commissioning parents to perform, and at the same time argue that the agreement should not be enforceable against the surrogate mother. However, Meyerson comments that 'this skewing of the distribution of advantages and disadvantages in the surrogate mother's favour is justified by the fact that she is more in need of protection than the commissioning parents, primarily because she has more to lose from the psychological point of view, but also because she is likely to be in worse financial circumstances'.<sup>690</sup>

The Commission prohibits commercial surrogacy. The surrogate mother may be reimbursed for her expenses, but should not receive a fee for her services. While it recognises that it is almost impossible to prevent secret payments to the surrogate mother, it has chosen not to impose criminal sanctions in this instance. However,

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<sup>690</sup> D Meyerson 'Surrogacy Agreements'. In Christina Murray (ed) *Gender and the New South African Legal Order* (1994) 141

commercial agencies are prohibited, as is advertising, and those who transgress are subject to criminal sanctions. It is submitted that the fear that permitting commercial surrogacy is likely to result in exploitation of women and children can be addressed by regulating the practice. Furthermore, it is argued that expecting the surrogate mother to perform without payment is exploitative in itself. In addition, the prohibition on paid surrogacy may frustrate attempts by the commissioning parents to find a woman willing to act as a surrogate mother. It is submitted that it is illogical to permit the practice of surrogacy, while placing unnecessary stumbling blocks in the path of prospective parents, and may encourage them to resort to clandestine arrangements with all its accompanying dangers. Furthermore, the fear that commercialism encourages inappropriate perceptions of women and children as commodities, is a moral concern. It is submitted that surrogacy is a valuable aid to infertile couples, and the prohibition thereof ignores this fact.

As previously mentioned, it is impossible to do justice to all the parties. Meyerson suggests that lawmakers should focus on the prevention of disputes, and that in this respect screening and counselling are essential.<sup>691</sup> The parties should be made aware of the dangers inherent in a surrogacy arrangement, and should be prepared for the possibility that the arrangement may go wrong.

Finally, it is submitted that the surrogate mother should not be compelled to relinquish the child, whether or not she is genetically related to it. Giving her a finite and not too lengthy period in which to make up her mind can protect the interests of the

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commissioning parents. Should she decide not to relinquish the child, it is also possible to recognise the relationship of the genetic parent or parents to the child, and make provision for their access to the child. It is submitted that in these circumstances, the commissioning parents should have the right to apply for custody of the child should the surrogate mother prove to be an unfit mother.

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<sup>691</sup> D Meyerson 'Surrogacy Agreements'. In Christina Murray (ed) *Gender and the New South African Legal Order* (1994) 142

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